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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK C. LAMBERT, Petitioner and Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, et al., Respondents and Appellees.	)	No. 22063

APPELLEES' BRIEF

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IN THE UNITED STATES COURT OF APPEALS

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APPELLEES' BRIEF

JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253. Proceedings in forma pauperis are authorized by Title 28, United States Code section 1915.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On September 4, 1962, appellant, a prisoner at San Quentin State Prison was convicted in the Superior Court of Los Angeles County of first degree murder (California Penal Code section 187) and sentenced to life imprisonment (1RT 46).[1/]

1. "1RT" refers to Volume One of the Transcript of Record on Appeal.

Appellant failed to perfect a timely appeal from the judgment of conviction and has not sought relief therefrom under 31(a) of the California Rules of Court.

An application for writ of habeas corpus to the California Supreme Court was denied on December 20, 1965.

B. Proceedings in the Federal Courts

Appellant filed a petition in forma pauperis for a writ of habeas corpus (No. 44855) in the District Court on March 7, 1966; and an order to show cause was issued on April 14 (1RT 1, 32). An evidentiary hearing was held before Judge Wollenberg on March 3, 1967;[2/] and briefs were filed by all parties (1RT 80, 96). On June 8, 1967, the order to show cause was discharged and the petition was dismissed (1RT 106-109). Orders were rendered on July 7 denying appellant's motion for a rehearing and granting his application for certificate of probable cause and for leave to appeal in forma pauperis (1RT 113-115). Appellant filed a notice of appeal to this Court on July 20 (1RT 116).

APPELLANT'S CONTENTIONS

1. Appellant was denied his Fifth, Sixth and Fourteenth Amendment rights to due process, to the effective assistance of counsel and to present witnesses in his own behalf.

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2. "2RT" refers to Volume Two of the Transcript of Record on Appeal, which contains the Reporter's Transcript of the proceedings at the hearing on March 3, 1967, on the order to show cause.

a. Trial counsel's failure to investigate thoroughly the facts of the case resulted in the presentation of a defense which was so unreasonable, as compared to other defenses available, that appellant was denied the effective assistance of counsel.

b. Appellant was denied due process in his right to present witnesses in his own behalf in that, as a consequence of his lack of participation in and consent to the defensive theory of intoxication, an essential defense was eliminated from the case.

2. There is no basis upon which to disqualify appellant from relief in federal habeas corpus.

a. The deliberate by-pass rule cannot apply in this case to bar appellant's claim for relief in that he was denied the assistance of counsel in perfecting an appeal.

b. Appellant's alleged improper use of available state procedures, as the consequence of not being provided with the assistance of counsel, cannot operate to bar him from relief in federal habeas corpus.

SUMMARY OF APPELLEES' ARGUMENT

I. Appellant has not exhausted available state remedies.

II. Appellant did not have a constitutional right to be represented by counsel between conviction and appeal.

III. Appellant received effective assistance of counsel.

IV. Appellant had no constitutional right to consent to and/or participate in the choice of defenses to be presented at trial.

ARGUMENT

I

APPELLANT HAS NOT EXHAUSTED AVAILABLE STATE REMEDIES.

Under the doctrine of Fay v. Noia, 372 U.S. 391 (1963), in determining whether a petitioner is precluded from relief on the grounds of waiver, the issues become (1) whether the State of California has provided petitioner with an orderly remedy by which to vindicate his asserted constitutional right, and (2) whether petitioner made a considered choice to abandon the privilege of seeking to vindicate that Federal right in the State courts. Fay v. Noia, supra at 439; Gladden v. Gidley, 337 F.2d 575, 579 (9th Cir. 1964).

The California law is well settled that the writ of habeas corpus cannot substitute for an appeal. In re Lessard, 62 Cal.2d 497, 503 (1965); In re Waltreus, 62 Cal.2d 218, 225 (1965); In re Mitchell, 56 Cal.2d 667, 671 (1961). A similar rule is applicable in Federal proceedings, see Dodd v. United States, 321 F.2d 240, 243 (9th Cir. 1963). As pointed out in Townsend v. Sain, 372 U.S. 293, 317 (1963):

> "The standard of inexcusable default set down in Fay v. Noia . . . does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedures."

Under California law to effect a timely appeal, notice of appeal should have been filed within ten days following rendition of the judgment. Rule 31, California Rules of Court. Judgment of conviction was rendered against petitioner on September 4, 1962. Appointed counsel Littlefield testified that, probably on the day of the conviction, he had discussed the subject of appeal with appellant and told him that the public defender's office ". . . would not take an appeal in the case and advised him that the notice of appeal would have to be filed within 10 days after the date of the sentence." (2RT 159:25-160:3). This discussion took place in the detention room next to the courtroom (2RT 160-161, 196, 197). The public defender's office was authorized to take appeals only in cases where it was felt that there was some substantial question of law or other reason that an appeal should be taken; not, as here, where there was merely a question of fact or credibility of witnesses (2RT 193-195).

Appellant denied that Littlefield had advised him that he had a right to appeal, which, he testified, was the reason he failed to file a timely notice of appeal. After discussing his case with his fellow inmates at Chino, who advised him regarding the procedure for taking an appeal, he allegedly wrote letters to both Littlefield and Judge Dawson, the Presiding Judge of the Superior Court. However, the prison records show that on October 4, 1962, a letter was sent only to the Superior Court (2RT 37-40).

Littlefield testified that he had seen the letter

to Judge Dawson, which stated that he had never advised appellant of his right to appeal. Littlefield remembered that he had in fact so advised appellant and, as a result, continued to remember it at the time of the evidentiary hearing (2RT 160). On October 14, 1965, petitioner attempted to file a notice of appeal with the Clerk of the Los Angeles County Superior Court; but the Clerk refused to file the late appeal and explained the proper procedure to be taken to effect late filing under California Rule of Court 31(a) (2RT 41).

Doubtless, upon further discussion of his case with other prisoners, it was pointed out to appellant that he was fortunate indeed to have received only a life imprisonment sentence under the first degree murder conviction; and that, under the California law <u>at that time</u>, if retried, there was a real possibility that he might receive the death penalty (2RT 161, 194). For a case which did not present strong grounds for appeal, this would surely have provided good reason for a decision to deliberately by-pass this state remedy of appeal. And, even before appellant wrote the letter to Judge Dawson, the 10 day period within which to file notice of appeal had expired.

Relief under Rule 31(a) was a remedy available at the time appellant's application for relief was filed in the District Court and remains available at this time. Three years after his conviction, the court clerk explained to appellant how to effect a late filing of an appeal. Appellant

did not file notice of appeal and he has not attempted at any time to so perfect an appeal from that judgment by seeking relief in the California courts from his failure to file a timely notice of appeal. Under Rule 31(a) of the California Rules of Court persons seeking to reinstate their right to appeal may file affidavits with the court explaining their failure to file a timely notice of appeal. The California Supreme Court has shown liberality in interpreting this rule so as to grant relief in a number of cases where good cause has been shown. See People v. Davis, 62 Cal.2d 806 (1965).

The doctrine of Fay v. Noia is consistent with the holding that appellant's failure to pursue California procedures to seek relief from his failure to file a timely notice of appeal constitutes a failure to exhaust available State remedies. See Holley v. Cheuvront, 351 F.2d 615 (9th Cir. 1965); Gravette v. Maxwell, 340 F.2d 95 (6th Cir. 1965).

As specifically provided in Title 28 United States Code section 2254, "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." Therefore, until appellant seeks relief from his failure to file a timely notice of appeal pursuant to Rule 31(a) or otherwise demonstrates that such relief is not available to him, he has not exhausted State remedies that were available at the time his petition was filed and remain available at this time.

We submit that the finding of the District Court that appellant is foreclosed from the relief he seeks because of his failure to exhaust available state remedies is correct (1RT 108).

II

APPELLANT DID NOT HAVE A CONSTITUTIONAL RIGHT TO BE REPRESENTED BY COUNSEL BETWEEN CONVICTION AND APPEAL.

Appellant contends that failure to provide him with counsel during the interim between imposition of sentence and the filing of an appeal was a deprivation of his constitutional right to counsel. We submit that appellant is foreclosed from raising this argument for the first time on appeal.

Moreover, neither the federal nor the California Courts have held that the advice of counsel at that stage of the proceedings is a constitutionally protected right; in fact, the California courts have actually ruled that it is not and have set forth persuasive reasoning for their views. In People v. Riser, 47 Cal.2d 594, 596, 305 P.2d 18 (1956), the court pointed out that the state has no duty to see that every convicted prisoner perfects an appeal, nor is it responsible should the public defender fail to act. And in In re Gonsalves, 48 Cal.2d 638, 645, 311 P.2d 483 (1957), it was noted that the courts of California are alert to protect the right of an imprisoned defendant, acting in propria persona, to appeal from a judgment of conviction of crime where he diligently attempts to timely initiate and

prosecute such an appeal. See also Joseph v. Klinger, 378 F.2d 308 (9th Cir. 1967).

In the Gonsalves case, the court relieved the appellant from default in preparation of the record because it was clear that he had taken every step he could possibly take to perfect his appeal and done all that he could in compliance with jail rules to institute an appeal. That situation is clearly distinguishable from the one at hand where there is evidence that appellant was timely advised by counsel of the procedure for perfecting an appeal. Counsel made it clear that he could not represent appellant on appeal or file the appeal for him. Appellant did not file an appeal within the 10 day limit after imposition of sentence. When, three years later, he did attempt to send a notice of appeal to the Superior Court Clerk, he received notice of the procedure to be followed in effecting a late appeal (RT 40-41); yet, appellant has never attempted to pursue this remedy.

In point is People v. Hatten, 64 Cal.2d 224, 228, 49 Cal.Rptr. 373 (1966), where it was recently held that:

> "Thus, the question presented is whether a defendant is entitled to relief where the record shows no promise or request to appeal, but does show he was ignorant of his appeal rights during the critical 10-day period, and as a result failed to request the attorney to take an appeal. Strong arguments of policy can be made

in support of such a right. An indigent defendant is entitled to counsel at trial, if he so desires. (Gideon v. Wainwright, 372 U.S. 335, 343, [83 S.Ct. 792, 9 L.Ed.2d 799]; Johnson v. Zerbst, 304 U.S. 458, 465, [58 S. Ct. 1019, 82 L.Ed. 1461].) Likewise, an indigent is entitled to counsel on appeal. (Douglas v. California, 372 U.S. 353, [83 S.Ct. 814, 9 L.Ed.2d 811].) It can be argued that an indigent should be entitled to advice of counsel during the period after sentence and before the notice of appeal must be filed. But neither this court, nor the federal courts, have as yet held that, in the absence of a request, the defendant must be advised either by the court or trial counsel of his right to appeal, or of his other rights to review, directly or collaterally, the trial proceedings. Certainly, in the absence of request, he need not be informed of his right to petition for coram nobis or habeas corpus, or of his right to certiorari to the United States Supreme Court. The right now claimed is comparable to those rights. If the rule is to be extended it should be extended by rule or by statute, and not by judicial decision."

III

APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

At the evidentiary hearing held in the United States District Court for the Northern District of California before Judge Wollenberg on March 3, 1967, the following evidence was disclosed:

From 1957 until the time of the hearing Wilbur Francis Littlefield had been employed in the Los Angeles Public Defender's Office. Prior to joining that office, he had engaged in criminal defense work while in private practice (2RT 142). In the Public Defender's Office, murder cases were assigned to the more experienced attorneys; and, at the time Littlefield was assigned to defend appellant, he was among the most experienced lawyers in his office, having attained the top pay grade (2RT 142-143). He entered the case in June, 1962, and saw appellant between three and twenty times, during which times all issues were covered (2RT 142, 145, 147, 162).

At his attorney's request, appellant wrote out three statements describing the background situation and all of the details of the murder (2RT 68-69, 146, 13). Littlefield had also seen a copy of the confession (2RT 176, 197). Upon his arrest, the police found two or three liquor bottles in the car (2RT 132, 134) and an open bottle of whiskey fell from appellant's inside coat pocket (2RT 56-57, 124). It had been evident to the police that he had

been drinking; and he told them that he had had two or three drinks prior to going to the real estate office where he killed his wife (2RT 129, 135-137). He also told his attorney that he had been drinking at the time of the murder (2RT 77, 79, 81, 187). Appellant testified that he had had a life-long history of an acute alcoholic problem (2RT 15, 20, 29, 80, 168).

Littlefield considered calling various witnesses, but rejected them for the following reasons. Appellant had asked that Littlefield call his stepdaughter Nancy, but advised it might be wiser to speak to her later after the shock of the murder had faded (2RT 169-170). The attorney did in fact speak with Nancy during the trial (2RT 84), but decided not to call her as a witness because he did not feel that she had had sufficient contact with appellant to be able to testify as to his state of sobriety on the day of the murder. Moreover, appellant had asserted that his wife had been having an affair, but his father and brother indicated that it wasn't true; and Littlefield did not want to introduce any evidence which might supply a motive for appellant to have committed the crime (2RT 174-175, 159). Similarly, he decided not to call character witnesses since the statements given by appellant indicated that he had made previous threats on the victim's life; and Littlefield was afraid that if she had communicated these threats to some other persons it might be introduced in evidence against appellant. Littlefield also feared that reputation evidence might work to appellant's

detriment by causing the jury to feel that he had spent most of his time drinking, rather than working, while his wife had to support the family (2RT 155-156).

On May 11, 1962, appellant had been examined by two psychiatrists whose reports indicated that he was sane (2RT 33, 157-158, 178). In addition, Littlefield also learned that, prior to the murder, appellant had once seen a psychologist named Mr. Zweig and then failed to keep further appointments (2RT 156-157, 77). Zweig's diagnosis was that appellant had an inability to control his drinking problem and probably had a schizoid personality (2RT 23-24). Littlefield had spoken with one of the attorneys who had previously represented appellant, who advised that he didn't think that Zweig would be of any help (2RT 157, 171); and, as a result, Littlefield decided not to call Zweig as a witness. His other reason for not calling Zweig was (2RT 170:16-171:2):

> "First that Mr. Lambert had been examined by two psychiatrists shortly after this incident had taken place and generally, proper or not, the weight of the psychiatrist's testimony is generally held, their testimony is held in greater esteem than the testimony of a psychologist. And also I felt that evidence that Mr. Lambert had made but one appearance before Dr. Zweig and then had cancelled or failed to make, keep any other appointments that he had made, at least that is what he

told me in his statement that he had done, would not help him so far as his appearance or image in front of the jury."

It was the general policy of the Public Defender's Office for counsel not to interview witnesses as there was a staff of investigators for that purpose (2RT 191). Accordingly, Littlefield dictated a request outlining the points he wanted the investigators to check (RT 151). Since Littlefield wanted to negate the prosecution's theories of deliberation and premeditation and that appellant bought the gun on the afternoon of the murder solely for that purpose, he instructed the investigative staff to try to find evidence that appellant was interested in guns and, on a number of occasions over a period of time, had looked at them in the store where he eventually purchased one (2RT 152). Moreover, he attempted to find evidence that appellant had made purchases of liquor at two establishments on the day of the murder. The investigators spoke personally with appellant for this purpose (2RT 153-154).

Upon learning the above information, it was Littlefield's judgment that the only defense that had any possibility of convincing the jury was the defense of intoxication. He explained this defensive theory (2RT 148:19-149:3, 196):

"At the time that this took place Mr. Lambert was under the influence of alcohol so that he did not have the ability to deliberate and

premeditate, that hopefully was the fact that this incident took place between himself and his wife was a result of a sudden quarrel or heat of passion which would have reduced the crime to voluntary manslaughter or if not he was enough under the influence of alcohol so that it would remove the deliberation and premeditation part and make it a second degree rather than a first."

Littlefield was aware at that time of the Wells-Gorshen rule in California which pertains to diminished responsibility or capacity, and stated (2RT 188:23-189:8):

"A. My own feeling was that . . . what I was trying to do throughout the entire trial was to raise the issue of his diminished responsibility because of his drinking.

"Q. Because of alcohol?

"A. Yes, sir.

"Q. I see. Were you familiar with that evidence of mental state, character disorders, various other kinds of information, would also have been relevant in the Wells-Gorshen Rule?

"A. Yes, sir."

To justify relief on the ground of constitutionally inadequate representation of counsel, an extreme case must be disclosed. It must appear that counsel's lack of diligence

or competence reduced the trial to a "farce or sham". People v. Ibarra, 60 Cal.2d 460, 464, 34 Cal.Rptr. 863 (1963). The appellant has the burden, moreover, of establishing his allegation of inadequate representation not as a matter of speculation, but as a demonstrable reality. People v. Reeves, 64 Cal.2d 766, 775, 51 Cal.Rptr. 691 (1966). This appellant has failed to do.

To summarize, counsel discussed the facts of the case with appellant, who furnished lengthy written accounts of the circumstances. He directed his investigative staff to interview witnesses and check the facts. Moreover, he personally interviewed the family, who were not able to bear out ppellant's statements. He was aware of the existence of a psychologists' report and had seen the psychiatric reports, both of which said that appellant was sane. He was aware of the legal principles involved in the California Wells-Gorshen Rule. He had seen appellant's confession. He had been told by appellant of his long history of alcoholism and knew that the police had evidence of his drinking on the day of the murder. As a result of his knowledge of the facts and subsequent investigation, as well as his knowledge of the applicable legal principles, he decided to use the defense of intoxication. He rejected other possible defenses such as diminished capacity as he felt it better strategy to avoid introducing evidence of premeditation. He felt also that it was not necessary to introduce evidence of appellant's mental state at the penalty phase of the trial inasmuch as

or competence reduced the trial to a "farce or sham". People v. Ibarra, 60 Cal.2d 460, 464, 34 Cal.Rptr. 863 (1963). The appellant has the burden, moreover, of establishing his allegation of inadequate representation not as a matter of speculation, but as a demonstrable reality. People v. Reeves, 64 Cal.2d 766, 775, 51 Cal.Rptr. 691 (1966). This appellant has failed to do.

To summarize, counsel discussed the facts of the case with appellant, who furnished lengthy written accounts of the circumstances. He directed his investigative staff to interview witnesses and check the facts. Moreover, he personally interviewed the family, who were not able to bear out ppellant's statements. He was aware of the existence of a psychologists' report and had seen the psychiatric reports, both of which said that appellant was sane. He was aware of the legal principles involved in the California Wells-Gorshen Rule. He had seen appellant's confession. He had been told by appellant of his long history of alcoholism and knew that the police had evidence of his drinking on the day of the murder. As a result of his knowledge of the facts and subsequent investigation, as well as his knowledge of the applicable legal principles, he decided to use the defense of intoxication. He rejected other possible defenses such as diminished capacity as he felt it better strategy to avoid introducing evidence of premeditation. He felt also that it was not necessary to introduce evidence of appellant's mental state at the penalty phase of the trial inasmuch as

he knew the prosecution was not planning to seek the death penalty (2RT 192).

The above evidence shows that trial counsel made a deliberate informed choice after undertaking the investigation and research essential to adequate trial presentation. After such investigation and research, trial counsel made reasonable decisions of tactics and strategy. There is no evidence that trial counsel failed to prepare, as alleged by appellant. This is not a case where the defense of diminished capacity was withheld in default of knowledge that reasonable inquiry would have produced and, hence, in default of any judgment at all so that the omission constituted a total failure to present the cause of the accused in any fundamental respect and resulted in a denial of the fair trial contemplated by the due process clause. Rather, the only possible valid allegation might be made is that a possible defense of appellant was withheld through faulty judgment. Such an allegation would not violate the standards set forth in Brubaker v. Dickson, 310 F.2d 30, 37 (9th Cir. 1962), where it was held:

> "Appellant was entitled to 'effective aid in the preparation and trial of the case.'
>
> "This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right. Due process does not require 'errorless

counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.' Determining whether the demands of due process were met in such a case as this requires a decision as to whether 'upon the whole course of the proceedings,' and in all the attending circumstances, there was a denial of fundamental fairness; it is inevitably a question of judgment and degree."

See also Pinedo v. United States, 347 F.2d 142, 148 (9th Cir. 1965).

Appellant was accorded a defense which was supported by the evidence and reasonable in view of the information available to counsel; and the District Court correctly found that the record does not show that the standards set in Brubaker v. Dickson, supra, has been violated (1RT 109).

IV

APPELLANT HAD NO CONSTITUTIONAL RIGHT TO CONSENT TO AND/OR PARTICIPATE IN THE CHOICE OF DEFENSES TO BE PRESENTED AT TRIAL.

When Littlefield was asked at the evidentiary hearing whether he discussed in his meetings with appellant possible defenses that might be available, he replied unequivocably, "Yes, sir."; and he went on to say that it was decided that the defense would be that appellant had been under the influence of alcohol at the time of the murder

(2RT 147). But appellant's participation in or consent to the choice of defense was contradicted by appellant's testimony (2RT 14). Appellant now contends that such consent of and/or participation by the accused in the choice of a defense theory is constitutionally required by the due process clause and the right to present witnesses in his own behalf.

The District Court held that in making the decision regarding the appropriate defense to be offered at the time of trial, an adequate background investigation into the facts and a competent knowledge of the law are required. It was found that appellant received the reasonably adequate professional aid to which he was entitled (1RT 114).

In United States v. Follette, 275 F.Supp. 416, 420 (S.D. N.Y. 1967), the court observed that a client is rarely in a position to enable him to make a competent evaluation of the legal issues at trial. And People v. Adams, 249 Cal. App.2d 501, 509, 57 Cal.Rptr. 389 (1967), held that,

> ". . . an attorney has considerable discretion in the conduct, both tactically and substantively, of an accused's defense. [Citation.] This is true both as to the kind of defense presented and the decision of when and whether to object to behavior of the prosecution."
>
> (Emphasis added.)

In Rhay v. Browder, 342 F.2d 345, 348 (9th Cir. 1965), the court quoted from Powell v. State of Alabama,

287 U.S. 45, 68-69, 53 S.Ct. 55, 67, 77 L.Ed. 158 (1932):

> "'. . . Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible. <u>He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one</u>. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. . . .'

"See also Gideon v. Wainwright, 1963, 372 U.S. 335, 344-445, 83 S.Ct. 792, 9 L.Ed.2d 799; Douglas v People of the State of California, 1963, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811. We are in hearty agreement with these views. And we think that it

inevitably flows from them that, when a defendant has counsel, as Browder did, it is counsel's decision on a question such as is here involved that must control. Counsel is the manager of the lawsuit; this is of the essence of the adversary system of which we are so proud. In the nature of things he must be, because he knows how to do the job and the defendant does not. That is why counsel must be there." (Emphasis added.)

See also Wilson v. Gray, 345 F.2d 282, 289 (9th Cir. 1965); and White v. Hancock, 355 F.2d 262, 264 (1st Cir. 1966).

Similarly, in Nelson v. People of the State of California, 346 F.2d 73 (9th Cir. 1965), it was held that counsel's decision, although made without prior consultation with the accused, to by-pass the contemporaneous-objection rule as part of trial strategy precluded the accused from asserting constitutional claims. The court then went on to say at page 81:

"Does the fact that here there was prior consultation with the accused, and that he disagreed with counsel's strategy, make a legal difference? This question has not been before the Supreme Court. Our view is that the result should be the same. Our reasons are that only counsel is competent to make such a decision, that counsel must be the

manager of the law-suit, that if such decisions are to be made by the defendant, he is likely to do himself more harm than good, and that a contrary rule would seriously impair the constitutional guaranty of the right to counsel. (See Rhay v. Browder, 9 Cir., 1965, 342 F.2d 345). One of the surest ways for counsel to lose a law suit is to permit his client to run the trial. We think that few competent counsel would accept retainers, or appointment under the Criminal Justice Act of 1964, to defend criminal cases, if they were to have to consult the defendant, and follow his views, on every issue of trial strategy that might, often as a matter of hindsight, involve some claim of constitutional right."

Appellant attempts to draw a distinction between decisions of strategy which occur during the trial, such as whether to object to the admission of evidence, and those decisions as to defense which occur prior to trial. He contends that all of the latter decisions are governed by the same rule of law which requires that a defendant personally enter his plea and that his counsel may not waive this right for him. However, for this Court to hold that defense counsel must consult with a defendant and secure his approval of the line of defense to be used in the case and, correspondingly, honor the defendant's ideas as to which

witnesses should be presented at the trial would wreak havoc upon the orderly trial of defendants in criminal cases.

In the case of a guilty plea, the defendant has only two choices. He can either plead guilty or not guilty; and if he refuses to make either plea, the court will automatically enter a plea of not guilty. Cal. Pen. Code § 1024. However, in deciding on a defense, there are many possible defenses which may be utilized in a criminal case. As stated by the cases cited above, only a trained attorney is in a position to judge the legal effect and relative desirability of choosing among these defenses. Moreover, if it were necessary to wait for a defendant to choose among the alternatives, he might never make up his mind, thus delaying the trial on criminal charges indefinitely. Such a rule would also undoubtedly open the door to post-trial complaints that a defendant had not been afforded proper information upon which to make an intelligent choice of defense and, therefore, had been deprived of his right in this regard; or that he had been unduly influenced by his attorney in making the choice.

Several decisions have involved the choice by counsel of strategy as to matters which did not occur iin the heat of trial. In Hensley v. United States, 281 F.2d 605, 609 (D.C. Cir. 1960), it is held that the failure of trial counsel to consult with an accused regarding the waiver of jury trial and to call the accused's wife as a witness constituted tactical decisions in the trial of the case and did not amount to denial of effective assistance

of counsel to the accused. Similarly, People v. Watson, 244 Cal.App.2d 89, 95, 52 Cal.Rptr. 821, 825 (1966), held that a defendant has no constitutional right to be personally consulted before the trial court accepts a withdrawal by defense counsel of a motion for mistrial.

CONCLUSION

It is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus should be affirmed.

DATED: June 18, 1968

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: June 18, 1968

JOYCE F. NEDDE
Deputy Attorney General
of the State of California

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDMUND EARL REEVES, Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Appellee.	)	NO. 22064

APPELLEE'S BRIEF

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JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California to entertain appellant's petition for a writ of habeas corpus was invoked under Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes an order in a habeas corpus proceeding reviewable in this Court when, as here, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant appeals from the order of the United States District Court for the Northern District of California, dated June 5, 1967, in the proceeding entitled Reeves v. Wilson, No. 46657.

A. Proceedings in the state trial court.

On March 26, 1965, appellant was arraigned in the Municipal Court, Bakersfield Judicial District, County of Kern, California, on a complaint charging murder (California Penal Code section 187) and robbery (California Penal Code section 211) (Exhibit 4, pp. 2-3). [1] Appellant was fully advised of his rights and at the conclusion of the court's admonition appellant requested the appointment of counsel (Exhibit 4, p. 3). The court appointed John Nain, Esq., to represent him in any further proceedings in the municipal court (Exhibit 4, pp. 3-4).

On April 1, 1965, the Grand Jury of Kern County conducted indictment proceedings on the above charges (Exhibit 1, pp. 48-68). Paul Leslie Pugh testified that on March 24, 1965, he was employed as a field gauger for Standard Oil Company (Exhibit 1, p. 57). At approximately 9:00-9:30 a.m. he and Floyd Parsons, another oil field worker, drove in separate cars to the New Hope lease located eighteen miles north of Bakersfield (Exhibit 1, pp. 57-58). Upon arrival Pugh observed a 1959 Ford vehicle near a toolhouse on the lease (Exhibit 1, p. 58). Appellant was outside the car, by the open car trunk, pouring something from a five-gallon can into another can in the trunk of his car (Exhibit 1, p. 58).

Pugh and Parsons parked their cars by the field office

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1. Unless otherwise indicated, exhibit references are to the exhibits admitted into evidence at the evidentiary hearing in the District Court.

and as Pugh started his work he saw Parsons walking in the direction of the Ford (Exhibit 1, p. 58). Shortly thereafter Pugh heard what he thought was Parsons walking up behind him (Exhibit 1, p. 59). Turning around he saw appellant holding a gun (Exhibit 1, p. 59). Appellant told Pugh to raise his hands and Pugh complied (Exhibit 1, p. 59). Parsons was standing about three feet from appellant and already had his hands up (Exhibit 1, p. 59). Pugh said "What do you want?", and appellant responded, "Unload your pockets and throw it on the ground." (Exhibit 1, p. 59). Pugh threw down his wallet containing about $145.00 and some small change; Parsons put down a fifty-cent piece, two dimes and a pocket knife (Exhibit 1, pp. 59-60). Pugh was looking at appellant "right in the eye" (Exhibit 1, p. 65).

Appellant directed the men to "turn around and start walking" (Exhibit 1, p. 60). As the men approached two tanks, Pugh started to go to the right and Parsons started to go to the left (Exhibit 1, p. 60). Appellant, gesturing with his pistol, ordered Pugh to the left with Parsons (Exhibit 1, pp. 60-61). They came to a narrow area under a catwalk and Pugh's and Parsons' bodies touched (Exhibit 1, p. 61). They were now hidden from the roadway (Exhibit 1, p. 61). At this moment the gun reported, firing slowly, and Parson's body lurched hard against Pugh (Exhibit 1, p. 61). Pugh jumped around the tank, took a zig-zag course across the tank area and shielded himself behind a boiler (Exhibit 1, pp. 61-62). Pugh then ran towards the road and, as he looked over his shoulder toward the tank area,

appellant fired twice at him (Exhibit 1, p. 62). Pugh hid in a clump of brush (Exhibit 1, p. 62).

Pugh watched appellant as he slowly walked back to the place where the men had been forced to put down their belongings and placed these items in his pocket (Exhibit 1, p. 62). Appel- then rushed back to the Ford and drove off (Exhibit 1, pp. 62-63).

Pugh found Parson's lifeless body by the tanks (Exhibit 1, pp. 63-64). He drove some six miles to the nearest phone and called the authorities who were on the scene in approximately fifteen minutes (Exhibit 1, p. 64).

Dr. Robert W. Huntington, a pathologist, testified that there were three bullet tracks through Parson's body, one entering Parsons' back (Exhibit 1, p. 52). The cause of death was a bullet wound of the heart (Exhibit 1, p. 56).

Appellant was indicted on charges of murder and robbery (Exhibit 2, pp. 2-3). He was arraigned in the Superior Court of Kern County on April 2, 1965 (Exhibit 1, p. 1). James Meeks, Esq., was appointed to represent him and the matter was continued until April 6 (Exhibit 1, p. 1).

On April 6 appellant appeared in court with Mr. Meeks who advised the court as follows (Exhibit 1, p. 3):

> "MR. MEEKS: Step up. Your Honor, I conferred with the defendant and also Mr. Leddy of the District Attorney's office, and I believe if it is possible, I would like a little more time on this matter. Mr. Nelson [the District Attorney] seems to be out of town on business and I would like to talk with him some more, that is, talk with him regarding this matter."

The court continued the matter until April 13 and appellant expressly concurred in the continuance (Exhibit 1, p. 3).

Appellant and Mr. Meeks appeared on April 13 and Mr. Meeks informed the court that Mr. Nelson, the District Attorney, was still out of town and that he had not been able to confer with him (Exhibit 1, p. 4). With the express approval of appellant, the matter was continued until April 28 (Exhibit 1, p. 4).

Mr. Meeks was ill on April 28 and the matter was continued to May 5 with appellant's consent (Exhibit 1, p. 5).

On May 5 appellant was ready to enter his plea and the following occurred after the reading of the indictment (Exhibit 1, pp. 8-9):

> "MR. MEEKS: To all of which the defendant, Mr. Reeves, enters a plea of not guilty by reason of insanity.
>
> "THE COURT: You enter that plea as to both counts?
>
> "MR. MEEKS: As to both counts. For the record, if the Court please, I have explained to Mr. Reeves that the Court will appoint psychiatrists to examine him and if the findings of the psychiatrists is that he is sane at the time of the commission of the offenses and also presently that a plea of guilty automatically comes into being. Is that a correct statement?
>
> "THE DEFENDANT: It is.
>
> "MR. MEEKS: And you understand that?
>
> "THE COURT: Mr. Meeks has fully explained your rights in this case, is that true?
>
> "THE DEFENDANT: Yes.
>
> "THE COURT: And you understand the nature of this plea as Mr. Meeks has just entered it in your behalf?

"THE DEFENDANT: Yes.

"THE COURT: And you concur with that plea?

"THE DEFENDANT: Yes.

"MR. MEEKS: Your Honor, could we have three psychiatrists appointed in this matter?

"THE COURT: Yes, before I do that, will you waive the informing the defendant of his rights in this matter?

"MR. MEEKS: I will so waive, for the record, your Honor.

"THE COURT: Mr. Reeves, will you waive the court's informing you of your rights in this matter?

"THE DEFENDANT: Yes, your Honor."

Three psychiatrists were then appointed: Dr. Matychowiak, Dr. Einstein and Dr. Finch (Exhibit 1, pp. 9-10). Mr. Meeks indicated his satisfaction with the doctors appointed and the matter was continued until May 27 (Exhibit 1, p. 10).

Appellant was examined by Dr. Matychowiak on May 14 and in conjunction with the examination gave an account of the killing (Exhibit 2, p. 16). According to the doctor's report, appellant said he was getting some gas when the victim came around the car with a stick in his hand. Appellant pulled a gun from the glove compartment and the victim dropped the stick. He had the victim and the other man empty their pockets so that he could get their car keys and prevent them from following him. Initially appellant told the doctor that the victim jumped him and he shot him. Then he told the doctor that he "felt the guy was going to leap at him, and so he shot him." He admitted to the doctor that he picked up the wallet (Exhibit 2, pp. 16-17).

Dr. Einstein examined appellant on May 24 (Exhibit 2, p. 11). Appellant told the doctor that his difficulties occurred when he was surprised by two workers while he was stealing gas on an oil lease. He had a gun in the glove compartment with which he subdued the two men, took the purse of one of them and attempted to march them into the woods so he could make an escape. When one of the men ran away and the other attempted to attack him he shot the latter "essentially as self-defense" (Exhibit 2, pp. 11-12).

Appellant was examined by Dr. Finch on May 12 (Exhibit 2, pp. 13-15). He related to Dr. Finch that he was stealing gasoline and the victim picked up a club and started toward him, whereupon appellant got his pistol to scare off the victim. He wanted to get the car keys to prevent the men from following him. However, when the victim advanced again with the club, he became frightened, panicked and fired in self-defense (Exhibit 2, p. 15).

The three doctors concluded that appellant was sane. Dr. Finch's report contained the following observation: "His thought content centered chiefly about his present situation, his trial and his hopes for a life sentence" (Exhibit 2, p. 15).

Appellant and Mr. Meeks appeared in superior court on May 27. The following occurred (Exhibit 1, pp. 12-13):

> "MR. MEEKS: Yes, Your Honor, I have read the three doctors' reports and their finding is, they all concur in the finding that the defendant Edmund Reeves is sane at the present time and was sane at the time of commission of the offense.

"THE COURT: All right, in view of --

"MR. MEEKS: I will stipulate with Mr. Nelson, the District Attorney, that the reports be submitted rather than to put on any further evidence as to the sanity of the defendant. Is that all right with you, Mr. Reeves?

"THE DEFENDANT: Yes.

"THE COURT: Is that all right with you?

"THE DEFENDANT: Yes.

"THE COURT: Do you understand what Mr. Meeks is saying?

"THE DEFENDANT: Yeh.

"MR. NELSON: We will so stipulate then, your Honor.

"THE COURT: All right, what do you want to do about a jury trial on this plea?

"MR. MEEKS: You mean on the issue of sanity? We will waive the jury and submit it on the doctors' reports.

"THE COURT: Do you also waive the jury, Mr. Reeves?

"THE DEFENDANT: Yes.

"THE COURT: All right. Do you waive the jury, Mr. Nelson?

"MR. NELSON: We will so stipulate, your Honor.

"THE COURT: The Court has also read and considered the report of Dr. Hans Einstein, and Dr. Charles S. Finch, Jr., from Atascadero State Hospital and the report of Dr. F. A. Matychowiak. After considering these reports, the Court hereby determines that the defendant Edmund Earl Reeves was sane at the time of commission of the offenses and is sane now."

Mr. Meeks then advised the court that he had discussed with appellant a stipulation that the degree of the murder was

first degree based on the California felony-murder rule, but that he wanted to ask appellant again if he wished to so stipulate (Exhibit 1, p. 13). Appellant said he understood the felony-murder rule (Exhibit 1, p. 14). He indicated to Mr. Meeks that he desired a hearing on the degree and Mr. Meeks so advised the court (Exhibit 1, p. 14). Appellant expressly waived jury trial on the issues of degree and penalty (Exhibit 1, pp. 14-15). The matter was continued until June 9 (Exhibit 1, pp. 15-16). On June 9 the matter was put over to June 11 by stipulation (Exhibit 2, p. 19).

On June 11 the court convened for the purpose of the hearing on degree and penalty (Exhibit 1, p. 17). Appellant having pled guilty to murder and robbery, Mr. Meeks stipulated with the District Attorney that the degree was first degree (Exhibit 1, pp. 17-18). Appellant expressly concurred in the stipulation (Exhibit 1, p. 18). It was further stipulated that the trial court could determine the penalty from the transcript of the grand jury proceedings [Exhibit 1, pp. 46-69] and appellant's prior conviction record [2/] (Exhibit 1, pp. 17-19). The court questioned appellant as follows (Exhibit 1, p. 19):

> "THE COURT: Mr. Reeves, will you concur in your counsel's stipulation that I may read and consider this transcript of the grand jury proceeding in your case and consider the same and among other, any

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2. This document, the so-called "rap sheet", was not an item of evidence at the evidentiary hearing in the District Court. However, respondent provided the District Court with a copy of the document on March 10, 1967, in conjunction with the filing of the return to order to show cause.

other items that are introduced, including the record of prior convictions in fixing the penalty in this matter?

"THE DEFENDANT: Yes, your Honor."

The court then continued the matter until June 23 for argument on penalty (Exhibit 1, pp. 19-20).

On June 23, prior to argument, it was stipulated that the robbery was in the second degree. Mr. Meeks again explained to appellant the felony-murder doctrine (Exhibit 1, p. 23):

"MR. MEEKS: As Mr. Nelson has pointed out, at this stage of the proceeding, we have stipulated that it is homicide of the first degree, and homicide in the commission of a robbery, by operation of law and as he said, actually the degree of the robbery, except for the possibility of a consecutive sentence is really immaterial.

"THE COURT: Mr. Reeves, will you join in that stipulation that it be fixed at robbery in the second degree?

"THE DEFENDANT: Yes.

"THE COURT: It is the lesser of the two degrees.

"THE DEFENDANT: Yes, your Honor"

Appellant again personally joined in a stipulation that the court could consider the record of his prior convictions (Exhibit 1, p. 29).

After the District Attorney argued to the court, Mr. Meeks made his argument (Exhibit 1, p. 34). He told the court how deeply he felt the responsibility for a man's life in such a case, having previously served in five other capital cases. He informed the court that appellant had told him on five different occasions that the victim had jumped him with a club. Mr.

Meeks said that from talking to appellant he believed that appellant acted out fear, and he suggested several possible stimulants of that fear (Exhibit 1, pp. 34-35). Mr. Meeks continued (Exhibit 1, p. 35):

> "The man stands ready and has thrown himself on the mercy of the court to pay the penalty, to adjust to society, in the commission of this offense, we have admitted openly and voluntarily, and as I say, Mr. Reeves has cooperated at all stages of the proceeding and he knows he has done the wrong thing but I am of the feeling that there had to have been some provocation. A man doesn't walk up to complete stranger he has never seen in his life and shoot him. There had to be some provocation. There had to be some motive, motivating impulse, and I think that impulse was fear."

After argument the court took the issue of penalty under submission. On June 30, the court imposed the penalty of death (Exhibit 1, p. 40-41).

B. Proceedings in the state appellate court.

Appellant's appeal to the California Supreme Court was automatic. [3/] Prior to submission of the cause, the California Supreme Court remanded the matter to the superior court for a hearing on a transcript correction (Exhibit 3). The case was submitted on the corrected transcript and on June 10, 1966, the conviction was affirmed. People v. Reeves, 64 Cal.2d 766, 51 Cal.Rptr. 691, 415 P.2d 35 (1966).

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3. Appellant was represented on appeal by Miss Mary Montgomery who also was one of appellant's attorneys in the proceedings below. The record of the state court appeal was introduced at the evidentiary hearing and consists of Exhibits 1 and 2.

The California Supreme Court fully considered the issue of whether appellant received the effective assistance of counsel. The court concluded, at page 774:

> "To justify relief on the ground of constitutionally inadequate representation of counsel, '"an extreme case must be disclosed' [Citations]. It must appear that counsel's lack of diligence or competence reduced the trial to a "farce or a sham." [Citations].' (People v. Ibarra, (1963) 60 Cal.2d 460, 464 [34 Cal.Rptr. 863, 386 P.2d 487].) Defendant has the burden, moreover, of establishing his allegation of inadequate representation 'not as a matter of speculation but as a demonstrable reality.' (Adams v. United States ex rel. McCann (1942) 317 U.S. 269, 281 [63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435]; accord, People v. Robillard (1960) supra, 55 Cal.2d 88, 97.)
>
> "Here defendant has failed to sustain that burden. There is no showing, for example of an 'unawareness of a rule of law basic to the case . . . that reasonable preparation would have revealed.' (People v. Ibarra (1963) supra, 60 Cal.2d 460, 466). Rather, the record discloses that Mr. Meeks was well aware of the tactical moves commonly made by counsel in the presence of strong inculpatory evidence against their clients, in the often fulfilled hope of impressing the trier of fact with their clients' candor, remorse, and willingness to cooperate. Defendant expressly concurred in every step thus taken, and he cannot now be heard to complain of the course followed merely because it proved unrewarding. Applicable here, by analogy, is the general rule that 'the right to counsel may not be used to subvert the orderly and efficient administration of justice' (People v. Douglas (1964) 61 Cal.2d 430, 435 [38 Cal.Rptr. 884, 392 P.2d 964], and cases cited.)"

Appellant filed a petition for a writ of certiorari, to review the above decision, in the United States Supreme Court. The petition was denied on November 14, 1966. Reeves v. California, 385 U.S. 952 (1966). A copy of the

petition was introduced at the evidentiary hearing as Exhibit 13.

C. State habeas corpus proceeding.

On August 11, 1966, appellant filed an application for a writ of habeas corpus in the California Supreme Court. The application was denied, without written opinion, on August 31, 1966. In re Reeves, Crim. No. 10305. On December 12, 1966, he filed another petition for a writ of habeas corpus which was denied by the California Supreme Court, without written opinion, on December 21, 1966. In re Reeves, Crim. No. 10683.

D. Habeas corpus proceedings in the District Court.

1. Proceedings on the order to show cause.

On March 7, 1967, appellant's petition for a writ of habeas corpus was filed in the District Court and an order to show cause was directed to appellee. Frederic Campagnoli, Esq., was appointed to represent appellant and continues to represent appellant in the instant appeal. Appellee filed a return to the order to show cause on March 10, 1967. The court heard argument on March 14, 17 and 20, during which time appellee lodged with the court the record on the state appeal and other documentation as requested by the court. On March 22 the court ordered an evidentiary hearing "to determine whether the said petitioner received adequate representation of counsel."

2. The evidentiary hearing.

An evidentiary hearing was conducted before the District Court on May 1, 1967 (H 1-243) 4/. Argument was heard by the court on the following day (H 244-266).

Appellant, upon examination by his appointed counsel, testified that he was 28 years old, had an eighth-grade education and since leaving school had spent most of his time in custody (H 6-7). His longest period of gainful employment was four months (H 7).

According to appellant, he had his first conference with Mr. Meeks on the day after Mr. Meeks was appointed, on April 3. 5/ (H 9-10). Mr. Meeks asked appellant to tell his story and appellant did so (H 11). Appellant testified that he told Mr. Meeks that he was getting gas at the oil lease when two men drove up and parked their cars near his (H 12). One of the men came over and questioned him and, after an exchange of words, called him a "son-of-a-bitch" (H 12). The man came at appellant with a club which he swung at him several times as appellant tried to jump into his car (H 12). Appellant pulled a gun from

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4. "H" is used to designate the reporter's transcript of the evidentiary hearing.

5. Appellant was probably confused about the date because he testified that Mr. Meeks at this conference told him that the judge had not yet made an appointment but had only requested Mr. Meeks to talk to him so that Mr. Meeks might decide if he would accept an appointment (H 10). Mr. Meeks, in fact, was appointed on April 2 (Exhibit 1, pp. 11; Exhibit 2, p. 5) (See also H 105).

the glove compartment, pointed it at the man and ordered him to throw the club away (H 12). He then had the man walk over to the other man and directed both to empty their pockets (H 12). According to appellant he wanted only their car keys and, when he didn't see any keys, he decided to run them off into the brush (H 12). One of the men started to walk the wrong way and appellant followed after him while the other man dropped behind (H 13). Appellant testified that he concluded his account to Mr. Meeks as follows (H 13):

> "[I] caught a glimpse out of the corner of my eye and I spun around. The deceased was leaping at me, bent over. He had something that he picked up off the ground. I don't know what it was. It looked like a pipe, maybe dirty pipe. When he came at me, I swung around and fired all in one motion and I took off running the other way.
>
> "I fired back over my shoulder as I was running. I run to my car and drove away."

Appellant testified that Mr. Meeks did not question him about his story and told him he didn't think it was first degree and would talk to the District Attorney (H 13-14). This was the only time he was able to relate the entire story to Mr. Meeks (H 29). On other occasions when Mr. Meeks asked him to go over the story they were interrupted by jail personnel (H 29). Appellant further testified that at this meeting, which lasted about twenty minutes and was held in the county jail, and at subsequent meetings, Mr. Meeks failed to inquire about his family and educational background (H 10, 13-14). However, they did discuss his criminal record and his employment (H 14).

Appellant gave testimony about a second meeting with Mr. Meeks in a holding cell just prior to the April 6 appearance in court. He claimed Mr. Meeks told him to plead guilty and get a life sentence (H 15). When appellant refused, Mr. Meeks asked for a continuance (H 15). The same thing occured at a third meeting in the holding cell on April 13 (H 15-16). Appellant asserted that Mr. Meeks told him that he felt the judge would give a life sentence (H 16). Mr. Meeks said the matter would have to be continued because he hadn't talked to the District Attorney (H 16).

Appellant said that he saw Mr. Meeks for the fourth time at the county jail about April 21 (H 17). They did not discuss the case but only a matter involving appellant's fiancee (H 16-17). He testified he saw Mr. Meeks again prior to the court appearance on April 28 (H 17). He claimed that Mr. Meeks urged him to plead guilty and that he again refused to do so (H 18). He saw Mr. Meeks in the jail in early May (H 18). Mr. Meeks, according to appellant, said that the judge told the District Attorney that the crime shouldn't be first degree and the death penalty shouldn't be sought (H 18-19). When appellant refused to plead guilty, Mr. Meeks then said they would try a plea of not guilty by reason of insanity and explained that such a plea would revert to a guilty plea if appellant were found sane (H 19). Mr. Meeks further explained that a psychiatrist would be appointed by the court (H 19). Appellant said he told Mr. Meeks "I wasn't crazy" and did not agree to such a plea (H 19). On

May 5, he talked to Mr. Meeks in the holding cell in the courthouse (H 19-20). Appellant testified that he again told Mr. Meeks he would not plead guilty or not guilty by reason of insanity (H 20-21). In court, moments later, he did plead not guilty by reason of insanity (H 20-21). The reason for this, appellant explained, was that "I felt hopeless", "I gave up", "Nobody would listen to me" (H 21).

Appellant stated that he never saw Mr. Meeks again until they met in the courtroom on May 27 (H 23). Mr. Meeks told him that he had read the psychiatrist's report but did not discuss a stipulation to submit the sanity issue on the report (H 23). Appellant said he never saw the report (H 23-24).

He talked to Mr. Meeks on June 11 and Mr. Meeks told him that he didn't want Pugh, the survivor, to take the stand (H 24-25). Mr. Meeks said that appellant's story would not be believed considering appellant's criminal record (H 25). He did not discuss the possibility of appellant taking the stand or any stipulation respecting the degree of the crime, the prior criminal record and the grand jury testimony of Pugh (H 25-26). Appellant testified he never saw or discussed Pugh's grand jury testimony and that he never talked about strategy or pleas with Mr. Meeks (H 27).

On June 23, according to appellant, he expected a hearing on degree and penalty and was unaware that Mr. Meeks was prepared to stipulate concerning these matters (H 27-28). He conferred with Mr. Meeks in jail prior to sentencing and in

the holding cell on the day of sentencing, June 30 (H 30-31). On the latter occasion, before going into court, Mr. Meeks told him that whatever happened didn't matter because "the case would never hold up in the higher courts anyway" (H 31).

Appellant testified that Mr. Meeks never discussed with him any investigation, any possible witnesses, the advisability of a jury or non-jury trial, any conversations with the District Attorney, or the possibility of a death penalty (H 32-34).

Upon examination by counsel for appellee, appellant admitted that he had been convicted of five prior felonies and that in each case he had pled guilty (H 36-41; Exhibits 5-9). When asked if he received adequate representation from his attorneys in these cases, he replied, in each instance, that they "told me to plead guilty and I pled guilty" (H 37-41). He further admitted that he had not prepared the petition for a writ of habeas corpus but that it had been prepared by a fellow inmate (H 41-42, 59).

Appellant said he knew the gun was loaded when he fired at Parsons from about 10 to 12 feet (H 43, 45). He fired five times but didn't know if he hit Parsons (H 45-46, 54). Appellant was unable to explain the discrepency between his testimony that Parsons had a weapon prior to the shooting and his statement to the prison psychiatrist which made no reference to such a weapon (H 48-49; Exhibit 10). He stated he did not see Parsons pick up the weapon, though earlier he had testified that it had

been picked up off the ground (H 13, 51).

Appellant related that he had talked to Mr. Meeks a couple of times about "pleading not guilty and self-defense" but that he was ignored (H 51). He admitted discussing pleas on several occasions although previously he had testified that these matters were not discussed (H 27, 52).

After shooting at Parsons, appellant said he ran (H 54). He never went back to see if Parsons had been hit and never called the authorities to report his claim that Parsons had attacked first (H 54-56). He did not tell Pugh that Parsons had attacked him at the car but instead marched both men off under gun point (H 56-57). He denied taking Pugh's wallet (H 58-59):

> "Q. Suppose you knew the prosecution had evidence -- had in fact located the wallet not at the scene of the crime but at some distance from the scene of the crime. Would you then have been willing to testify in Superior Court that you did not take the wallet?
>
> "A. Yes, sir."

Appellant conceded that in open court he freely and voluntarily concurred in the actions of Mr. Meeks, but reiterated his claim that he had given up and had decided merely to agree (H 62-67, 69, 73, 77).

At the evidentiary hearing, Mr. Meeks was examined first by counsel for appellant (H 89). Mr. Meeks testified that he commenced the practice of law in California in 1947 (H 90). He served in the Kern County District Attorney's Office from

1947 until 1954 handling criminal prosecutions including homicides (H 90-91). Since then he had been in the private practice of law with offices in Bakersfield (H 91-92). During this period he had represented about 500 indigent defendants in misdemeanor and felony cases (H 97). 6/ In March 1965 he was contacted by the Clerk and by Judge Steele of the Superior Court and asked if he would accept an appointment to represent appellant (H 92-94, 100).

Mr. Meeks then talked to Mr. Nelson, the District Attorney, and reviewed the prosecution's evidence (H 112-114). 7/ Mr. Meeks recalled conferring with appellant for some three hours on April 5 (H 105). He believed he had seen appellant at an earlier time but couldn't recall the date (H 105). At this conference he asked appellant to relate what transpired in the transaction (H 106-107). Appellant told him that he was getting gasoline when two men drove up, asked him what he was doing and then began berating him. Appellant told Mr. Meeks that he thought the men might jump him so he got his gun (H 108). He had the men empty their pockets and started them walking toward the tanks (H 108). The men drifted apart and appellant ordered them

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6. Kern County does not have a Public Defender (H 92).

7. This conference with the District Attorney is supported by Mr. Meeks statement in court on April 6: "Mr. Nelson seems to be out of town on business and I would like to talk to him some more, that is, talk to him regarding this matter" (Exhibit 1, p.3). See also the testimony on Mr. Nelson (H 211).

to get back together (H 108). Appellant thought the men might jump him and he shot one of the men (H 108-110). Appellant did not tell him that the man made a move toward him (H 109). Mr. Meeks went over the story with appellant but still could not "figure out why he fired the shot" (H 109).

After the conference Mr. Meeks went to the homicide detail of the Sheriff's office, heard its account of the evidence, and reviewed reports and photographs of the scene and appellant's criminal record (H 110-111, 125, 145). He talked to the men who were working on the case and to appellant's girl friend (H 111, 118, 145). He also reviewed the grand jury transcript (H 115, 126). He formed the opinion that the evidence against his client was of "an inflammatory nature" (H 116).

Mr. Meeks appeared in court with appellant on April 13 and April 28 and on these occasions they also conferred (H 119, 123). On May 4, the day before the plea was entered, they conferred for two hours in the county jail (H 119). Appellant's background and education were discussed (H 127). Mr. Meeks explained "in detail and thoroughly" the various possible pleas (H 122). Appellant told him to do what he thought best (H 123). Mr. Meeks testifed (H 125):

> "A. And I explained to him that the evidence wasn't good, it wasn't favorable. In my mind I had thought there might have been a possibility through psychiatric examination to detect some breakdown in his behavior, that he could have been momentarily insane, temporarily insane or whatever the psychiatriast --
>
> "Q. Go ahead. Have you concluded?

"A. Yes.

"Q. You appreciated the fact that by entering this plea of not guilty by reason of insanity, if he were found sane he automatically had pleaded guilty to the charge.

"A. That is correct, and I so informed him and the record will so reflect."

On May 5 they saw each other in the holding cell prior to entry of plea and appellant voiced no objection to a plea of not guilty by reason of insanity (H 127). Mr. Meeks advised his client that he would be examined by psychiatrists and told appellant: "'You tell them everything that transpired just like you have told it to me'" (H 138). Mr. Meeks wanted to get appellant's story before the judge through the doctors' reports (H 138).

Thereafter Mr. Meeks discussed appellant's case on the telephone with Dr. Matychowiak and Dr. Feinstein, two of the appointed alienists (H 130-131). On May 27, prior to the court hearing on the question of sanity, Mr. Meeks reviewed the doctor's reports with appellant (H 129-130). It was decided to submit the issue on the reports because Mr. Meeks "didn't think anything more could be developed than appeared in the reports" (H 131). After reviewing all the evidence and after many conferences with appellant, Mr. Meeks concluded, and so advised his client, "'the best thing we can do in the case under the circumstances is to enter a plea and throw yourself on the mercy of the Court'" (H 129, 135).

Mr. Meeks conferred further with the District Attorney on June 8 and with Appellant on June 9 (H 135-136). It was then

decided that appellant would not testify, that the degree of the killing was first degree, and that the issue of penalty be submitted on the grand jury transcript and the record of convictions (H 140-141, 144). Mr. Meeks' purpose was to preclude the District Attorney from "augmentation and accentuation" of the record in what he believed was an inflammatory case (H 140-142, 148). Mr. Meeks testified (H 141):

> "I was endeavoring to avoid our District Attorney accentuating or adding any more fuel to the fire than necessary because of my pattern of approach on this thing, and I advised Mr. Reeves to enter this plea and throw himself on the mercy of the Court in hopes that the Court would pass judgment of life in prison."

On examination by counsel for respondent, Mr. Meeks testified that his investigation of the case included a visit to the scene of the killing (H 154, 161). He then identified a series of official police reports and testified that he had reviewed and considered the contents of the reports during the course of his investigation prior to plea (H 155-162; Exhibits 15, 16, 17, 18, 19, 21, 22). The limitations on the size of this brief prevents a summary of the contents of these reports. However, by reviewing the reports, Mr. Meeks became aware of the overwhelming evidence which the prosecution had and was prepared to use. Mr. Meeks also identified certain physical evidence and photographs in the possession of the prosecution (H 162-166; Exhibits 23-A through 23-P, 24, 25).

Mr. Meeks compared appellant's story of the killing with the evidence in the hands of the prosecution (H 167-168).

He considered the impact of appellant's story, in the context of the prosecution's evidence, upon a jury and upon the trial judge (H 168, 170). He considered the fact that an experienced District Attorney would be trying the case (H 169). Another factor was that the trial judge, to the knowledge of Mr. Meeks, had never imposed the death penalty (H 170). Mr. Meeks was further concerned about the prosecution developing conflicts among appellant's statements to the psychiatrists (H 173). Moreover, Mr. Meeks was of the opinion that appellant would be a poor witness in his own behalf (H 174-175). With respect to the record of prior convictions, Mr. Meeks knew that the District Attorney could bring in evidence of the convictions whether or not there were a stipulation (H 177-178). Consequently, Mr. Meeks pursued a strategy of getting the prosecution to enter into certain stipulations which he hoped would foreclose the District Attorney's case (H 180):

> "MR. MURPHY: Q. Mr. Meeks, when you received this stipulation -- when you had the agreement to the stipulation from the District Attorney, as a defense attorney how did you value this stipulation?
>
> "A. Well, I felt that it shut the District Attorney off from bringing in all the necessary evidence that he might see fit to bring in on the issue of the penalty and on cross-examination, and so forth.
>
> "I wanted to have the record go to the Court as free as possible of any augmented comment by witnesses or Mr. Nelson, the District Attorney.
>
> "Q. Then as I understand your trial strategy, this stipulation fit within that strategy to show your cooperation with the trial court and also to limit what the trial court knew about the crime and knew about the defendant.

"A. That is correct.

"Q. Mr. Meeks, you testified that if you were to try this case again you would follow the same approach, is that right?

"A. I would."

Mr. Meeks denied that he had ever promised appellant that he would get life imprisonment or that he told appellant that the trial judge would give a life sentence (H 181-182). He denied ever threatening or coercing appellant (H 182). He testified that appellant was at all times cooperative with him, appeared to comprehend the advice given and expressed no dissatisfaction with the actions of counsel (H 183-184). Appellant never requested to take the stand (H 183).

Mr. Nelson, the District Attorney of Kern County, also testified at the evidentiary hearing (H 210). Mr. Nelson recalled first talking to Mr. Meeks soon after the grand jury indictment came down (H 211). The prosecution's file was made available to Mr. Meeks and the evidence was discussed in detail (H 212-213, 215). Thereafter, on several occasions, Mr. Meeks approached him on the possibility of getting a lesser penalty (H 213-214). Mr. Nelson advised him that he would seek the death penalty (H 214).

Mr. Meeks related appellant's story to Mr. Nelson who advised Mr. Meeks that no club or stick was found at the scene, that Parson's wallet and an oil can with gasoline from the lease were found a considerable distance away, that appellant had told conflicting stories of the events to certain prosecution witnesses, that appellant had been connected with the murder

weapon, that the bullet which killed Parsons matched bullets found where appellant previously did some target shooting, and that Pugh was an excellent witness (H 215-223, 231-232). Mr. Nelson testified (H 223):

> "MR. MURPHY: Q. The important thing as far as this proceeding goes, Mr. Nelson, is whether or not you acquainted Mr. Meeks during the course of the proceedings with all this evidence.
>
> A. Yes.
>
> Q. Which you had.
>
> A. Yes. Step by step I went through and showed that the testimony of the witness, Mr. Pugh was verified at the scene by the physical evidence and that the story he told by the defendant at the scene was not only verified, but the evidence was to the contrary and couldn't have been. We couldn't find one physical evidence item that would verify any type of attack by the deceased or Mr. Pugh."

Mr. Nelson further testified that the prosecution intended to present all its evidence and to bring in the witnesses involved in the prior offenses, which evidence he believed would be "very effective" (H 224, 230- 232). He initially refused to stipulate with Mr. Meeks to limit the evidence on degree and penalty because he "wished to present [the] entire case" (H 224). Later he changed his mind because he believed the court's decision would turn on the question of rehabilitation (H 225).

The matter was submitted to the District Court after argument held on May 2 (H 244-266).

APPELLANT'S SPECIFICATION OF ERROR

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

SUMMARY OF APPELLEE'S ARGUMENT

THE EVIDENCE BEFORE THE DISTRICT COURT IS SUFFICIENT TO SUPPORT THE FINDINGS THAT APPELLANT RECEIVED EFFECTIVE ASSISTANCE FROM HIS COURT-APPOINTED ATTORNEY AND THAT APPELLANT KNOWINGLY AND UNDERSTANDABLY CONCURRED IN THE ACTIONS OF HIS ATTORNEY.

ARGUMENT

APPELLANT RECEIVED EFFECTIVE ASSISTANCE FROM HIS COURT-APPOINTED ATTORNEY AND KNOWINGLY AND UNDERSTANDABLY CONCURRED IN THE ACTIONS OF HIS ATTORNEY.

Appellant was entitled to the effective assistance of counsel at all critical stages of the criminal proceedings against him. Powell v. Alabama, 287 U.S. 45, 66-71 (1932); White v. Maryland, 373 U.S. 59, 60 (1963); Wilson v. Rose, 366 F.2d 611, 614 (9th Cir. 1966); People v. Sarazzawski, 27 Cal.2d 7, 17, 161 P.2d 934 (1945). We, of course, have no dispute with the many cases cited by appellant which reiterate this proposition of constitutional law.

The District Court, after a complete evidentiary hearing on this question, concluded that appellant received constitutionally adequate representation from Mr. Meeks, his attorney. It is only necessary on this appeal to examine the evidence to determine if this finding is supported by the evidence. Such finding must stand unless clearly erroneous. Barber v. Gladden,

327 F.2d 101, 104 (9th Cir. 1964), cert. denied 377 U.S. 971 (1964).

1. Mr. Meeks was a qualified and experienced attorney.

Mr. Meeks had practiced law in Kern County, California, since 1947, and was familiar with the community (H 89-90, 168-169). He served in the District Attorney's office for seven years where he prosecuted murder cases along with other felony matters (H 90-91). Subsequently, as a private practitioner, he had handled over 500 misdemeanor and felony matters (H 96-97). He knew the District Attorney and his staff and had known the trial judge for twenty-five years (H 94-96, 169-170, 208). He considered accepting the appointment to represent appellant at the request of the trial judge and the clerk of the court (H 91-93).

2. Mr. Meeks thoroughly investigated the case.

Mr. Meeks' conduct in preliminary investigation and criminal discovery provides a textbook example of what a defense attorney should do. A list of the steps he took to acquaint himself with the case and to evaluate the evidence would include the following significant items:

a. At the Sheriff's Office he talked to the men who were assigned the case, many whom he knew personally (H 110, 120, 145, 152, 166, 204). He studied reports, photographs and the physical evidence (H 111, 120, 145-146, 152, 154, 161-166, 204; Exhibits 15-22, 23a-23p, 24-27).

b. He talked to the District Attorney on many occasions

and reviewed the case with him and his deputies (H 111-114, 120, 145-146, 169). He examined the prosecution's file (H 112, 114, 161-166). He and the District Attorney bargained on the question of possible punishment (H 120, 145, 176, 181-182, 211-216, 218-225).

c. He visited the scene of the crime (H 161).

d. He reviewed the grand jury transcript (H 115, 126).

e. He interviewed appellant's girl friend as a possible witness and talked to someone in appellant's family (H 116-119, 127-128).

f. He studied appellant's prior criminal record (H 125).

g. He talked to the court-appointed doctors prior to their reports being filed (H 130-131).

3. Mr. Meeks and appellant conferred, reviewed the evidence, discussed the law and considered tactics.

Mr. Meeks conferred with appellant on numerous occasions both in the county jail and in the courthouse prior to hearing dates (H 105-110, 113, 119, 120-123, 129, 131). Before plea they thoroughly went over appellant's version of the killing (H 105-110, 114-115, 167). Mr. Meeks told appellant that the prosecution's evidence was inflammatory and adverse, and that if the case went to a jury the death penalty would probably be imposed (H 120, 168). They considered the impact of appellant's story upon a jury or a trial judge (H 168). Mr. Meeks explained in detail the different pleas available and their consequences (H 121-123, 125, 137, 171). Appellant's prior

criminal record was discussed as well as his background and education level (H 127, 198). The possibility that appellant was insane was considered by Mr. Meeks and Mr. Meeks advised a plea of not guilty by reason of insanity (H 121-122, 128, 134-135). Appellant told Mr. Meeks to do what he thought best (H 121, 135).

Appellant at all times appeared to comprehend Mr. Meeks' advice (H 135, 174, 176-177, 183). Mr. Meeks told him that doctors would be appointed to examine him (H 183-184, Exhibit 1, p. 9). Mr. Meeks believed that through the psychiatric reports he could get appellant's story before the trial court without submitting him to cross-examination (H 137-138, 169, 173). He advised appellant to tell the story to the doctors (H 138, 172).

After the plea, Mr. Meeks advised appellant of the results of the doctors' examinations (H 129-130). They reviewed the evidence respecting the degree of the crime (H 134-135). A stipulation that the murder was first degree was discussed (H 144). Appellant again told Mr. Meeks to do what he thought best (H 144).

At no time during these numerous conferences did appellant ever object to any action taken by Mr. Meeks (H 183). At no time did appellant ever request to testify (H 183). Mr. Meeks made no promises to mislead appellant about the possible punishment (H 180-181, 205). Mr. Meeks used no threats or coercive tactics (H 182).

4. Mr. Meeks was fully informed on law and procedure.

A review of the record discloses that Mr. Meeks was fully informed on law and procedure. Appellant does not allege

any legal errors in the defense of appellant. We have found none. Compare Wilson v. Rose, 366 F. 2d 611, 614 (9th Cir. 1966).

5. Mr. Meeks' judgment was considered and informed.

Mr. Meeks decision, concurred in by appellant was as follows (H 152):

> "The evidence, as it appeared to me, was not only inflammatory, it was very adverse to this man and I felt in my considered opinion the best thing to do under the circumstances was to plead guilty, throw him on the mercy of the Court and hope that we get a life sentence."

Mr. Meeks' strategy was to cooperate with the court and at the same time prevent inflammatory details concerning the crime and appellant from reaching the court except in "a purely documentary form" (H 152-153, 201-209).

This was not an uninformed decision. This decision was made by an experienced attorney thoroughly familiar with the facts of the case. This was not a hasty decision. It was arrived at only after many conferences with appellant over a period of one month. Yet it is this decision, a matter of informed legal judgment, with which appellant takes issue.

Appellant first contends that his conferences with Mr. Meeks were not long enough (Br. p. 10-11). However, he doesn't suggest how long they should have been and if they had been longer what more might have been accomplished. The record shows that they conferred prior to plea for three hours on April 5 and two hours on May 4, in addition to numerous other conferences of unreported duration on other dates (H 105, 119).

Certainly, the effectiveness of counsel is not to be measured by the hours, minutes and seconds the attorney spends with his client. See Allen v. Wilson, 365 F.2d 881, 883 (9th Cir. 1966); Joseph v. United States, 321 F.2d 710, 712-713 (9th Cir. 1963), cert. denied 375 U.S. 977 (1964).

Appellant contends that they had no prior discussions about the psychiatric examinations, or about his background, medical history and family (Br., pp. 10-11). He is mistaken. Mr. Meeks discussed the pending examinations with appellant and specifically advised him to tell the doctors his story (H 138, 172). Appellant's background and educational level were discussed not only with appellant but apparently with someone in the family (H 127, 198). He telephoned and talked to two of the doctors before their reports were submitted (H 130-131). Appellant asserts that Mr. Meeks was not present during these examinations. Assuming this to be the fact, he does not suggest what Mr. Meeks might have accomplished by his presence. Appellant's background, of course, was brought before the court through the psychiatric reports (Exhibit 2, pp. 11-18).

Appellant concludes that it was error in judgment for Mr. Meeks to submit the issue of penalty on the grand jury transcript, the record of prior convictions and argument (Br. p. 12-13). As the record indicates the District Attorney could have put on, and intended to put on, all the evidence of guilt and all the evidence and detail of appellant's past crimes at the penalty phase (H 224-226, 230-232). Mr. Meeks was aware of this

and this is precisely what he wanted to avoid (H 177-180). A "cold" record may sometimes be better than a "hot" record.

Mr. Meeks did not want appellant to take the stand at the penalty phase because there was too much to lose. Appellant was not an articulate witness and the District Attorney was a formidable cross-examiner (H 169, 174-175, 205). The District Attorney would then open his case and there would be a direct confrontation between Pugh's version and appellant's version of the killing. Pugh was reportedly a good witness (H 231-232). Mr. Meeks had evaluated the impact of appellant's story against the prosecution's evidence (H 168). He knew this evidence was adverse and inflammatory (H 168). Appellant's version did not jibe with the physical evidence, e.g., no club was found at the scene and the victim's wallet had been taken (H 215, 219-220, 223). The District Attorney had confessions and admissions which appellant had made to certain witnesses (H 218-219). Under such circumstances Mr. Meeks exercised good judgment in not calling appellant to the stand, assuming appellant would have testified.

Appellant argues that nothing was offered in mitigation of penalty. He does not, however, indicate what might have been offered.

Appellant's version of the events did get before the court in the doctors' reports and in Mr. Meeks' argument. This is what Mr. Meeks intended. He did not want appellant to take the stand and be destroyed. The strategy of seeking mercy is for

counsel to emphasize the defendant's contrition and his willingness to cooperate, by offering and entering into such waivers and stipulations as will expedite the disposition of the case.

Appellant had the burden before the District Court of establishing his allegation of inadequate representation "not as a matter of speculation but as a demonstrable reality" Adams v. United States, 317 U.S. 269, 281 (1942). He failed to do so. Consequently, the finding of the District Court as supported by the evidence of record must be affirmed.

The testimony of Mr. Meeks at the evidentiary hearing is manifestly consistent with the trial record which discloses that appellant expressly in open court concurred in each and every stipulation made.

The trial record discloses that appellant and his attorney conferred on several occasions prior to plea (Exhibit 1, pp. 3-6). The record of the May 5 arraignment indicates that appellant had been advised by Mr. Meeks and understood that in the event he were found sane, his plea of not guilty by reason of insanity would become in effect a plea of guilty (Exhibit 1, pp. 7-11).

Appellant expressly concurred in every step taken by Mr. Meeks, and he cannot now complain of the course followed merely because it proved unsuccessful (Exhibit 1, pp. 12-42).

CONCLUSION

For the foregoing reasons we respectfully submit that order of the District Court should be affirmed.

DATED: December 11, 1967.

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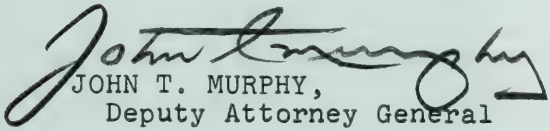

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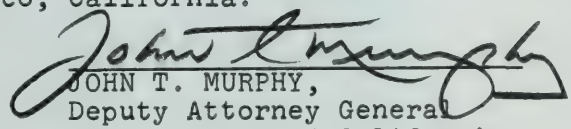
CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: December 11, 1967.
San Francisco, California.



JOHN T. MURPHY,
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of the State of California

No. 22065

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

McKee & Co., a partnership,

Plaintiff and Appellant,

vs.

First National Bank of San Diego, a National Banking Association,

Defendant and Appellee.

On Appeal From the United States District Court for the Southern District of the State of California.

APPELLANT'S OPENING BRIEF.

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No. 22065

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

McKee & Co., a partnership,

Plaintiff and Appellant,

vs.

First National Bank of San Diego, a National Banking Association,

Defendant and Appellee.

On Appeal From the United States District Court for the Southern District of the State of California.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a summary judgment in favor of defendant First National Bank of San Diego (appellee herein), entered on April 6, 1967 by the United States District Court for the Southern District of California [R. 266-267.] On January 12, 1967, plaintiff and appellant herein, McKee & Co., a partnership brought this action for injunctive relief and for damages as an action arising under the National Bank Act, Title 12 U.S.C. §§24.61 and 72 [R. 2-12, 132-134.] A supplemental and amended com-

plaint was lodged February 16, 1967 and was deemed filed by the District Court and appellee for the purposes of the motion for summary judgment [R. 132-134, 154, 169]. The District Court's juridiction was invoked under 28 U.S.C. §1311 [R. 2]. Appellant filed in this Court a timely application for appeal under 28 U.S.C. §1291, and this Court's jurisdiction rests upon that section [R. 208].

Statement of the Case.

This is an action brought by appellant McKee & Co., a shareholder of the First National Bank, to test the validity of certain amendments to the bylaws of appellee Bank, particularly as those amendments applied to appellant. The bylaw amendments are challenged as being contrary to provisions of the National Bank Act, Title 12 U.S.C. §§ 24, 61 and 72, and the general law of the State of California [R. 2-10, 132-134].

The Facts of the Case.

As this is an appeal from a summary judgment and the Court below held that appellant was not entitled to relief as a matter of law, for the purposes of this appeal all of the facts raised in appellant's affidavits must be deemed true. Accordingly the facts are set forth in some detail.

At the time the complaint herein was filed, appellant McKee & Co., owned 84,670 shares of the common stock of appellee Bank, which had a fair market value of approximately $2,500,000 [R. 35-36].

These shares had been acquired, by purchase in the open market, at various times from 1964 through 1966. By December 9, 1966, McKee & Co., had acquired al-

most exactly 100,000 of the 1,056,000 outstanding shares of the Bank [R. 72].

The federal statutes specifically require that the Board of Directors of a National Bank consist of a minimum of five members and that it be elected by "cumulative voting" (12 U.S.C.A. §61). In December, 1966, the by-laws of defendant Bank provided for 21 Directors. As McKee & Co. owned about 10% of the outstanding stock, it would be able to elect two Directors. In late November or December, 1966, the general partner of the plaintiff, Donald McKee, requested Claude Blakemore, the President of defendant Bank, to include two nominees of McKee & Co. on the management slate for election to the Board [R. 137, p. 11-16].

In mid-December, 1966, Mr. McKee and Mr. Blakemore met in Los Angeles. At that time Mr. McKee requested Mr. Blakemore to include Bradbury Clark and William Tooley on the management slate for election to the Board [R. 37]. Mr. Clark was born and educated in San Diego, and now practices law with the firm of O'Melveny and Myers, in Los Angeles. He resides in Los Angeles County, but has extensive business dealings in San Diego County [R. 144, line 21 to 145]. Mr. Tooley was a resident of San Diego from 1956 through 1963, and since that time has maintained extensive business contacts in the San Diego County [R. 139-140]. In 1966 he was a resident of Arizona.

Mr. Blakemore informed Mr. McKee that the Executive Committee of the Bank had voted to invite the nomination of only one man. He suggested that Mr. McKee nominate someone other than Mr. Clark or Mr. Tooley. The man he named was not a resident of San Diego County [R. 36, lines 16-25; R. 137, lines 17-29].

In late December of 1966, Mr. McKee informed Mr. Blakemore that McKee & Co. was entitled to place the names of Mr. Clark and Mr. Tooley in nomination for election to the Board of Directors, and it intended to do so [R. 37, lines 26-30]. By that time, the records of defendants Bank had been "closed", in the sense that pursuant to a resolution of the Board, only shareholders of record early in December, were entitled to vote for members of the Board of Directors.

On January 4, 1967, the Board of Directors of appellee Bank met and unanimously adopted certain amendments to the Bank's bylaws, which amendments are set forth in length in Appendix A.

It is alleged in the Complaint that the sole motive of the Board of Directors, in holding this special meeting, and amending the By-laws, was to prevent McKee and Co. from electing anyone to the Board (Complaint, paras. V to XIV).

Briefly, the amendments added additional provisions to Section 1.3 of the bylaws which required nominations for the appellee's Board of Directors to be delivered to the president of the Bank not less than 14 days prior to any meeting called for the purpose of electing directors, and further required detailed information about each nominee, such as whether the nominee was an attorney, whether he had been involved in any proxy contest in the last 10 years, the amount of stock held by the nominee or members of his family, when such shares were acquired, the nature and extent of any agreements that the nominee might have with others concerning the stock he held, whether such agreements were with other Banks, and, if so, whether the nominee had an agreement regarding future employment with such other banks, the

total amount of shares that would be voted for the nominee, and the amounts of stock, if any, owned by the nominee in other Banks doing business in California. At this special meeting, the Board also adopted a resolution, providing that the Board should have 19, rather than 21, members.

The amendments also added a new Section 2.8 to the bylaws of appellee Bank which dealt with the qualifications of members of the Board of Directors. No one could be a member of the Bank's Board who had not been a resident of a County in which the Bank maintained a banking office for at least one year prior to his election. Appellee knew Tooley was a resident of Arizona. Nor could anyone be a member of the Board who was an attorney of any other banking corporation engaged in business in California. Appellee also knew that Clark was a resident of Los Angeles County, and was a partner in a law firm that had partners who represented Banking Corporations [R. 137, 164].

The Bank did not notify McKee & Co. or any other shareholder of the proposal to amend its by-laws, nor did it serve McKee & Co., or any other shareholder, with a copy of the amendment. The proxy material, mailed about January 4, 1967, contained a writing indicating that the by-laws relating to nomination and qualifications for directors had changed and that any person interested therein should contact the bank. On January 6, 1967, a copy of the amendments were read to an attorney for McKee & Co. and on January 10, 1967, a written copy of the amended by-laws were delivered to an attorney for McKee & Company [R. 36, line 31, to R. 37, line 9]. As the annual meeting of the share-

holders had been set for January 25, 1967, notice of any nomination of McKee & Co. for the Board of Directors had to be delivered to the President of the Bank, and to the Comptroller of the Currency, not later than January 11, 1967 [R. 21-22]. In the time available, between January 5th to January 10th, McKee & Co. attempted to find a resident of San Diego County who was *qualified,* under the by-laws, to serve on the Board of Directors, and who would consent to being nominated to that position. It was unable to do so. Accordingly, on January 10, 1967, McKee & Co., plaintiff herein, served notice of their intention to nominate Mr. Clark and Mr. Tooley, to the Board.

Appellant filed this action on January 13, 1967 and sought a preliminary injunction, to enjoin appellee from refusing to accept the names of Tooley and Clark as nominees and from holding the scheduled elections for the Board of Directors while the questioned amendments were still in effect [R. 48-49]. This application was denied on January 25, 1967, and appellee proceeded to hold its annual meeting on that day [R. 95].

At the meeting, the Bank's president advised the stockholders present that the nominees presented by appellant were ineligible by virtue of the provisions of the recent amendments to the bylaws. He stated that in conversations with Mr. McKee he had learned that the latter intended to nominate certain persons, and it was felt by the Bank that those persons were not local and that their potential loyalty to appellee Bank was open to question; that the appellee Bank had encouraged and built up business over the past 80 years on the philosophy that it was wholly directed and managed locally, that much money had been spent to create the

image that the Bank was wholly local.[1] He continued that for these reasons the Bank had amended its bylaws so as to formulate a long standing policy of having only local persons on the Board, known to be loyal to the Bank [R. 163-165].

Notwithstanding the fact that Clark and Tooley were declared ineligible, each received slightly in excess of 1,000,000 votes, more than enough to elect them. The nominees on the management slate received 781,000 or more votes [R. 133, 199].

On February 3, 1967, appellee Bank filed a motion for summary judgment, which motion was granted, and judgment entered thereon on April 6, 1967 [R. 206-207]. In its Findings of Fact and Conclusions of Law [R. 196-200], among other things, the District Judge found that appellant's nominations were in conformance with bylaw 1.3, as amended, that the amendment to bylaw Section 2.8 was with the intention and for the purpose of rendering ineligible the nominees of appellant, and that appellee knew that although said amendment appeared innocuous on its face, as a practical matter, at least for the election of January 25, 1967, its practical effect was to exclude Clark and Tooley [R. 199, Find. 20]. The District Judge concluded that even assuming the appellant's showing with respect to appellee Bank's motive and purpose in adopting the bylaw was true, such motive and intent was not a matter of judicial inquiry, and that appellant's alle-

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[1]On April 19, 1967, appellee BANK announced that it was acquiring, subject to shareholder approval, the Saddleback National Bank of Tustin, California, the Huntington-Valley Bank of Huntington Beach, California, and on June 22, 1967 made a similar anouncement with respect to its intended acquisition of the Heritage-Wilshire Bank of Los Angeles, California (Records of the Comptroller of Currency).

gations with respect thereto were irrelevant. The Court stated, in the Findings: "For the purpose of the motion for summary judgment, the court assumes as true the plaintiff's showing as to interest and purpose in amending the By-laws" [Finding 20, R. 199]. It concluded that therefore the bylaws as amended were reasonable as at matter of law and were reasonably applied to appellant's nominees without discrimination; that *appellant* had never sought a waiver of the new provisions of the bylaws, and that there was no genuine issue as to any material fact [R. 200].

Specifications of Errors Relied Upon.

1. The District Court erred in holding that appellee Bank's motives and intent in adoption of the amendments to the bylaws were irrelevant.

2. The District Court erred in holding that the amendments to the bylaws were reasonably applied to appellant and its nominees without discrimination.

3. The District Court erred in holding that the amendments to the bylaws were reasonable as a matter of law.

4. The District Court erred in holding that there were no genuine issues of material fact.

5. The District Court erred in concluding that the appellant was entitled to no relief.

Questions Presented.

1. Is the question of whether a particular bylaw is reasonable or not, always a question of law?

2. May a National Banking Corporation enact bylaws which have as their motive and purpose, the exclusion of certain known persons from the Board of

Directors, which persons are the nominees of a minority stockholder and would otherwise have been elected?

3. Does the Board of Directors of a National Banking Corporation owe a fiduciary duty to a minority stockholder?

4. May the Board of Directors of a National Banking Corporation enact a bylaw to intentionally nullify a minority stockholder's cumulative voting power?

Statutes Involved.

1. 12 U.S.C. §24. CORPORATE POWERS OF ASSOCIATIONS.

> "Upon duly making and filing articles of association and an organization certificate that [a national banking] association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—"
>
> * * *
>
> "SIXTH. To prescribe by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers, appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed."
>
> * * *

2. 12 U.S.C. §61. RIGHT OF SHAREHOLDERS TO VOTE HOLDING COMPANY AFFILIATES—VOTING PERMITS.—

> "In all elections of directors, each shareholder shall have the right to vote the number of shares

owned by him for as many persons as there are directors to be elected, or to cumulate such shares and give one candidate as many votes as the number of directors multiplied by the number of his shares shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and in deciding all other questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him; except that (1) this shall not be construed as limiting the voting rights of holders of preferred stock under the terms and provisions of articles of association, or amendments thereto, adopted pursuant to the provisions of section 302-(a) of the Emergency Banking and Bank Conservation Act, approved March 9, 1933, as amended [§51b(a) of this title], (2) in the election of directors, shares of its own stock held by a national bank as sole trustee, whether registered in its own name as such trustee or in the name of its nominee, shall not be voted by the registered owner unless under the terms of the trust the manner in which such shares shall be voted may be determined by a donor or beneficiary of the trust and unless such donor or beneficiary actually directs how such shares shall be voted, (3) shares of its own stock held by a national bank and one or more persons as trustees may be voted by such other person or persons, as trustees, in the same manner as if he or they were the sole trustee, and (4) shares controlled by any holding company affiliate of a national bank shall not be voted unless such holding company affiliate shall have first ob-

tained a voting permit as hereinafter provided, which permit is in force at the time such shares are voted, but such holding company affiliate may, without obtaining such permit, vote in favor of placing the association in voluntary liquidation or taking any other action pertaining to the voluntary liquidation of such association. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or bookkeeper of such bank shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote. Whenever shares of stock cannot be voted by reason of being held by the bank as sole trustee, such shares shall be excluded in determining whether matters voted upon by the shareholders were adopted by the requisite percentage of shares.

For the purposes of this section shares shall be deemed to be controlled by a holding company affiliate if they are owned or controlled directly or indirectly by such holding company affiliate, or held by any trustee for the benefit of the shareholders or members thereof.

Any such holding company affiliate may make application to the Board of Governors of the Federal Reserve System for a voting permit entitling it to vote the stock controlled by it at any or all meetings of shareholders of such bank or authorizing the trustee or trustees holding the stock for its benefit or for the benefit of its shareholders so to vote the same. The Federal Reserve Board [Board of Governors of the Federal Reserve System] may, in its discretion, grant or with-

hold such permit as the public interest may require. In acting upon such application, the Board shall consider the financial condition of the applicant, the general character of its managements, and the probable effect of the granting of such permit upon the affairs of such bank, but no such permit shall be granted upon the following conditions:"

* * *

3. 12 U.S.C. §72. QUALIFICATIONS.—

"Every director must during his whole term of service, be a citizen of the United States, and at least two-thirds of the directors must have resided in the State, Territory, or District in which the association is located, or within one hundred miles of the location of the office of the association, for at least one year immediately preceding their election, and must be residents of such State or within a one-hundred-mile territory of the location of the association during their continuance in office. Every director must own in his own right shares of the capital stock of the association of which he is a director the aggregate par value of which shall not be less than $1,000, unless the capital of the bank shall not exceed $25,000 in which case he must own in his right shares of such capital stock the aggregate par value of which shall not be less than $500. Any director who ceases to be the owner of the required number of shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place."

Summary of Argument.

The members of the Board of Directors of a National Bank stand in a fiduciary relationship to the Bank and to the minority shareholders thereof. Under the terms of the summary judgment and the Findings and Conclusions upon which it was based, appellee National Bank was permitted to amend its bylaws with the motive and specific purpose of preventing appellant, a minority stockholder from nominating and electing certain persons to the Bank's Board of Directors. The bylaws in question admittedly were enacted for just that reason, though carefully drafted to appear valid upon their face. It is respectfully submitted that when evidence of such improper motive and practical discriminatory effect is placed before the Court, a genuine issue concerning a material fact has been presented and a Court may not, as a matter of law, find that such bylaws are reasonable and therefore valid.

ARGUMENT.

I.

A Motion for Summary Judgment Should Not Be Granted Where There Is a Genuine Issue as to a Material Fact.

While a motion for summary judgment provides a means of disposing of sham cases, it will not be granted when there is a genuine fact issue. *Stevens v. Howard D. Johnson Co.,* (4th Cir., 1950) 81 F. 2d 390; *McHenry v. Ford Motor Co.,* (6th Cir., 1959) 269 F. 2d 18.

Further, it has frequently been held that the motion is looked upon with disfavor. *United Meat Co. v. R.F.C.,* (1949) 174 F. 2d 528, 85 U.S. App. D. C. 9.

Likewise, it has been said that a litigant has a right to a trial where there is the slightest doubt as to the facts. *Peckham v. Ronrico Corp.,* (1st Cir. 1948) 171 F. 2d 653, 657.

It is submitted that in the case at bar, the Court erred in granting a summary judgment because the parties were entitled to a trial on the important issues of fact.

II.

The Bylaws of Appellee Bank May Be Found to Be Unreasonable if the Motive and Purpose of the Board of Directors in Adopting Them Was to Render Ineligible Known Nominees to the Board Submitted by a Minority Stockholder.

The National Banking Act, 12 U.S.C. §24, provides that a National Banking Association may, through its Board of Directors adopt bylaws not inconsistent with the law. The law referred to is that set forth in

other relevant Federal statutes, decisions of Federal Courts, and to all of the laws of the State, in so far as they do not conflict with Federal law. *Anderson National Bank v. Luckett,* (1944) 321 U.S. 233. 64 S. Ct. 599, 88 L. ed. 692. Both the Federal Courts and the California Courts have unequivocally stated that corporate bylaws must not only be reasonable in themselves, but also reasonable in their application. *Selama-Dindings Plantations, Ltd. v. Durham,* (D.C. Ohio 1963) 216 F. Supp. 104, 115; Affirmed (6th Cir. 1964) 337 F. 2d 949; *People's Home Savings Bank v. Superior Court of the City and County of San Francisco,* 104 Cal. 649, 652; 38 Pac. 452 (1894).

In *Selama-Dindings Plantations, Ltd. v. Durham,* the validity of two corporate bylaws was considered by the Court. One prohibited the stenographic recordation of the proceedings of the Board of Directors and the other provided for an executive committee from which minority directors were excluded. After a trial on the merits, the Court concluded that although the questioned bylaws were reasonable and therefore valid,

> "It is a general essential of their validity that bylaws shall be reasonable and not arbitrary or oppressive. Amendments and new bylaws, equally with those adopted in the beginning, must meet these general requirements. And bylaws must not only be reasonable themselves, but must not be unreasonable in their practical application." 216 F. Supp. at p. 115.

The validity of a bylaw of a bank dealing with the manner in which a proxy could be voted was considered in *People's Home Savings Bank v. Superior Court,*

supra. In declaring that the by-laws were in conflict with the law of the State of California, the Court said,

> ". . . Corporations have no power to create by-laws that are unreasonable in their practical application, or that are violative of the statute of the state; . . ." 104 Cal. at p. 652.

The judgment of the trial Court in the instant case can stand only if, as a matter of law, the bylaws in question are valid, that is, reasonable within the definitions given to that term by the Federal and California Courts. It is submitted that the Courts of both jurisdictions, as well as the learned writers on the question have concluded that whether a bylaw is reasonable or not invariably depends upon the facts and circumstances of each individual case. An examination of the cases relied upon by the District Court for the proposition that the reasonableness of bylaws is a matter of law, discloses an absence of relationship between the passage of the questioned bylaw and its application to the complaining shareholder or other party.

Thus in *Tu-Vu Drive-In Corp. v. Ashkins,* 61 Cal. 2d 283, 391 P. 2d 828 (1964), an amendment to the bylaws of a closely held corporation provided that shares of stock must first be offered for sale to the other stockholders before they could be sold to an outsider. The amendment was adopted on June 24, 1960, and was amended on June 23, 1961. Its legal and practical effect was the same as to all stockholders. No facts appear from the record that the bylaw was passed

for the principal purpose of affecting or limiting his rights, nor does the record disclose that the complaining stockholder was personally prejudiced in any way. There was no evidence in the record that the remaining stockholders would have paid less for Ashkin's shares than she could have obtained on the open market. However, the Court in *Tu-Vu* went on to point out that in other cases a "right of first refusal" by law might be invalid where all the other facts and circumstances of each case were considered. *Tu-Vu Drive-In, supra,* 61 Cal. 2d at p. 286, footnote 3. Further, it is vital to note that *Tu-Vu Drive-In Corporation* was closely held by only three stockholders where business motives might justify a bylaw which would be unreasonable for a publicly owned banking corporation such as appellee herein.

The Court below also placed heavy reliance on *People v. Ittner,* 165 Ill. App. 360 (1911). The facts of that case disclose that the corporation had a bylaw that a director (or any member of his family) could not be directly or indirectly interested as a stockholder in a like firm or association. Two persons, otherwise elected, were excluded from the Board as a result of this bylaw. On a Writ of *quo warranto,* the Court was asked to hold the bylaw unreasonable as a matter of law. The Appellate Court held that the bylaw was reasonable and reasonably applied to the complaining stockholder. The Court in the *Ittner* case quoted at length from Fletcher, *Cyclopedia Corporations,* as did the Court below. However, neither acknowledged the principal and well docu-

mented proposition set forth in 8 Fletcher, *Cyclopedia Corporations,* §4191, pp. 721-729 (perm. ed. 1966), which states, after reiterating that a bylaw and any amendments thereto must be both reasonable on their face and in their application,

> "It is manifest that reasonableness in its nature is not a matter for determination by any universal test or general rule, and that the reasonableness of any particular bylaw or bylaws *depends almost entirely upon the facts and circumstances of the particular case.*" Fletcher, Cyclopedia, at p. 725 (emphasis addded).

As authority for that proposition, the treatise cites *Selama-Dindings, supra,* and the California case of *Bennett v. Hibernia Bank,* 47 Cal. 2d 540, 305 P. 2d 20 (1956).

The *Bennett* case involved a bylaw of a membership banking corporation which provided "No one shall be deemed a member whose account is once closed." The Bank sought to apply it against one who became a member before its adoption. While the bylaw appeared valid on its face, and its adoption grounded in legitimate business motives, the Court held that the reasonableness of the bylaw was not a question of law, but that

> "The reasonableness of the by-law must be considered in the light of all the circumstances, including such matters as the purposes for which the corporation was organized and the extent of the rights of the particular member involved. Hiber-

nia's certificate of incorporation provides that 'the object for which it is formed is that of aggregating the funds and savings of the members of said Corporation and of others, and of preserving and safely investing the same for their common benefit.' It may be that it was considered necessary to require members to retain their accounts and deposits with Hibernia in order to promote the success of the bank in accordance with the purposes for which it was organized. However, these are matters which must be determined by the trier of fact in the light of all of the evidence." 47 Cal. 2d at pp. 552, 553.

From the foregoing authorities it is apparent that the validity and reasonableness of a bylaw depends upon the facts of the individual case. It is also apparent that the reasonableness of a bylaw is to be considered in light of the purposes of the corporation and the correlative purpose of the adoption of the bylaw, together with its practical application and extent of impairment, if any, of the rights of the stockholder. See Fletcher, *Cyclopedia Corporations, Ibid.; Re Rogers Imports, Inc.,* 202 Misc. 761, 116 N.Y.S. 2d 106 (1952); *Mancini v. Patrizi,* 87 Cal. App. 435, 262 Pac. 375 (1927).

The District Court acknowledged the rule set forth in *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886), that a statute or ordinance, although apparently reasonable and constitutional on its face, might nonetheless be unreasonable and unconstitutional when applied discriminatorily to one per-

son or group. *Such application would clearly be a factual determination.* It is therefore surprising that the District Court noted in its opinion granting the summary judgment that

> "There is utterly no showing of any such unreasonable application or threat of application of the bylaws or any such discrimination or threat of discrimination. So far as the record shows, the new bylaws will be applied fairly and reasonably and without discrimination to any party." [R. 190].

It is submitted the record is replete with facts demonstrating that the bylaws were unreasonable and were unreasonably applied to appellant.

We observe, at the outset, that the by-laws distinguish between the procedure required for nominations by management, and those made by persons "other than management." Moreover, the relatively short period of time, between the adoption of the by-laws, and the date for filing notice of nominations is unreasonable, on its face, or at least raises a factual issue as to reasonableness.

In this regard, we observe that on January 4, 1967, the date the Amendments were adopted, Appellant could not have sold or transferred its shares to another party, for nomination or voting on the members of the Board, for the books of the Bank were already "closed", as to the record date for voting at the shareholder's meeting. This in itself, we submit, indicates the Board's action was unreasonable.

Moreover, in thus attempting to *retro-actively* alter a shareholder's right to nominate candidates of its own choice for the Board of Directors, the Board clearly vio-

lated California law. The power to nominate a member of the Board of Directors is one of the most important rights of a shareholder, and we submit that it may not be altered, retrospectively. As stated in *Bornstein v. District Grand Lodge,* 2 Cal. App. 6, 24 at 628, if "by giving it a retrospective operation it would have the effect to annul or impair an existing obligation on the part of the corporation, such by-law will be held unreasonable and in contravention of existing laws." Similarly, in *Lindsay-Strathmore Irrigation District v. Wutchumna Water Co.,* 111 Cal. App. 688, 701 the Court stated that by-laws must *operate* equally upon all persons of the same class, and a by-law adopted by the Board of Directors for the sole purpose of excluding the shareholder from enjoyment of the rights represented by stock already acquired was therefore void. (See also 12 Cal. Jur. 2d 660-661).

Application of the new by-laws to disqualify the duly elected nominees of McKee & Co. was also improper because *notice* of the new by-laws was not duly given the shareholders. The regulations of the Comptroller of the Currency specifically provide that "Three preliminary copies of any additional soliciting material, relating to the same meeting or subject matter, furnished to security holders subsequent to the proxy statement shall be filed with the Comptroller at least two days (exclusive of Saturdays, Sundays or holidays) prior to the date copies of such material are first sent or given to security holders, or such shorter period prior to such date as the Comptroller may authorize upon a showing of good cause therefore." (Part II of Title 12, Code of Fed. Reg., as revised in 31 F.R. 6949, May 12, 1966).

The record shows that the appellee Bank did not file the amended by-laws, together with the notice of amendment, with the Comptroller, at least two days prior to the date the proxy material was sent to the shareholders. It follows that as a matter of law, the shareholders, including appellant, did not receive timely notice of the changes in nomination and qualification of directors.

The District Court relied heavily on the fact that appellant did not ask appellee Bank to waive the 14 day notice requirement of bylaw Section 1.3, so that new acceptable nominess could be submitted.

However, the by-laws do not provide for such waiver, and there is absolutely no factual basis, in the record, to support the Court's *presumption* that such waiver could, or would, have been granted [*Cf.* Opinion, R. 791, and Finds. 13 and 14, and Conclusion 5, at R. 198 and 200]. It is the general rule, in California, that a by-law may only be waived by the *unanimous* consent of the shareholders. (*Hymen v. Stein Co.,* 47 Cal. App. 605). In this instance, it was impossible to obtain such consent, prior to the shareholder's meeting. The vote at the meeting, and the attitude of management, shows that *unanimous* consent was not obtainable.

If, as appellant contends, the *motive* of the Directors in amending the by-laws was to exclude appellant's nominee, from the Board, it is evident that such waiver would not have been made by the Bank officers or Directors. It was possible for the Bank officers to waive the residence requirement, and they refused to do so.

The District Court also overlooks the fact that appellant knew the Bank intended a "battle", and that it was

apparent that the amendments were enacted to carry out that threat and to block appellant. The law does not require a useless act. Further, it would be unrealistic to expect appellant, in a short period of less than 2 weeks, to find two substantial persons who had sufficient experience and could devote the time required to the directorship of a growing multi-branch Bank.

By analogy, in other fields of the law, reasonableness is a question of fact. Thus the reasonableness of rate regulations has been held to upon the circumstances of each case. See *Noroton Water Company v. Public Utilities Commission,* 193 A. 2d 724, 24 Conn. Sup. 441 (1962); *Birmingham Electric Co. v. Alabama Public Service Commission,* 47 So. 2d 455, 254 Ala. 140 (1950).

It remains but to inquire whether or not there was a genuine issue on a material issue of fact as shown by the record from below. For the purpose of ruling upon the motion for summary judgment, the Court assumed that the following facts were true, although it is to be noted that appellee Bank disputes said facts [R. 171-172]:

1. There was an intent and purpose on the part of the directors of the defendant-appellee to exclude appellant's nominees from the Board of Directors.

2. There is a lack of any showing that Clark and Tooley, appellant's nominees, would not have been loyal directors.

3. That the executive committee of appellee Bank, prior to the amendment of the bylaws had stated that they would permit appellant to nom-

inate one director, not a resident of San Diego County.

4. That appellee-Bank was then informed that appellant desired to nominate and elect two directors and that appellee's president stated there would be a "battle" would ensue.

5. That in the past directors had served on the Board who were not residents of San Diego County.

6. That appellee-Bank was negotiating toward the acquisition or merger with a Bank or Banks which are located outside of San Diego County.

From the foregoing it is apparent that the reasonableness of appellee's Bank's amendments to its bylaws and the reasonableness of their application to appellant present several questions of fact that must be determined at a trial after both parties have had an opportunity to engage in extensive discovery proceedings. To hold otherwise would be tantamount to ruling that a Bank or corporation could, for example, lawfully adopt a bylaw providing that only persons who had previously served upon the Board of Directors would be eligible for subsequent election thereto. Such a bylaw, which might appear valid on its face, as with those in the case at bar, would effectively deprive a minority stockholder of the rights of cumulative voting accorded to him under 12 U.S.C. §61.

Accordingly, it is respectfully submitted that the District Court was in error in holding that appellee's bylaws were reasonable and valid as a matter of law and that they had been reasonably applied to appellant. The reasonableness of the bylaws and their application presented genuine issues of material facts upon which appellant was and is entitled to a full trial on the merits.

III.

Granting of Summary Judgment Was Prejudicial Error in That There Was a Genuine Issue of Material Fact as to Whether the Bylaws Were so Unreasonable as to Breach the Defendant's Directors Fiduciary Duty to the Corporation and to Minority Shareholders.

As hereinabove set forth, in the case at bar the District Judge found the questioned bylaws reasonable regardless of the motives underlying their formulation [R. 199-200], and therefore, precluded any inquiry into whether or not the directors who enacted these bylaws adhered to their fiduciary duty to the corporation and to minority shareholders. It is respectfully urged that this was prejudicial error, in that there appeared from the pleadings a "genuine issue of material fact" as to whether or not the directors breached their fiduciary duties.

In *Perlman v. Feldman* (2nd Cir. 1954), 219 F. 2d 173, minority stockholders brought a derivative action against Feldman, who was a director and dominant stockholder of the Newport Corporation, for restitution of allegedly illegal gains resulting from the sale of his controlling interest in the corporation. The Court held on appeal that:

> "Both as director and as dominant stockholder, Feldman stood in a fiduciary relationship to the corporation and to the minority stockholders as beneficiaries thereof." (*Perlman, supra,* p. 175).

Thus, in considering the law of the State of incorporation, the Federal Court of Appeals for the Second Circuit, imposed a fiduciary duty on directors which ran to the corporation and to minority shareholders.

See also, *Pepper v. Litton,* 308 U.S. 295, 306, 60 S. Ct. 238, 84 L. ed. 281 (1939), relied upon in *Perlman.*

California law imposes a similar duty upon corporate directors (Cal. Corp. Code §820). In California directors are fiduciaries and must exercise their powers in good faith, and with a view to the interest of the corporation. In *Bancroft-Whitney Co. v. Glen,* 64 Cal. 2d 327, 49 Cal. Rptr. 825 (1966), the California Supreme Court said at page 345:

> "A public policy . . . has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation . . ."

The burden of proof with respect to the reasonableness of a fiduciary's actions is upon the fiduciary. *Rogers v. Hill* (1933), 289 U.S. 582, 53 S. Ct. 731, 77 L. ed. 1385.

In the instant case plaintiff set forth in its counter affidavits that the express purpose of the bylaws now attacked were to exclude the two directors selected by the minority shareholders. It is appellant's contention that if this were true then it constitutes a breach of the dominant stockholder's fiduciary duty to the minority shareholders and the corporation. It indirectly impinges upon the right of minority shareholders to vote their shares cumulatively for the candidate of their choice which right is mandatory in California (Cal. Corp. Code §2235) and under the National Bank Act. 12 U.S.C. §61. By granting summary judgment to the defendants the District Judge ignored the issue of fact

set up in the pleadings, precluded proof on defendant directors' alleged breach of their fiduciary duty, and thereby, it is submitted, committed prejudicial error.

In *D'ippolito v. Cities Service Company,* 374 F. 2d 643 (2nd Cir. 1967) the District Court granted summary judgment against seven plaintiffs and they filed a mandamus action to allow the filing of an amended complaint. The Court of Appeals reversed the District Court's holding that under the allegations of plaintiff's complaint it appeared that some defendants may have acquired unclean hands so as to bring in the doctrine of *Perlman v. Feldman* (*D'ippolito, supra,* p. 648).

In the case at bar the allegations contained in plaintiff's complaint, and the affidavits in opposition to summary judgment raise the inference of "unclean hands" on the part of defendant's directors, and plaintiff should, therefore, be allowed a trial on the merits of his action.

The ruling below is squarely contrary to the law of California, which holds that a corporate by-law is only reasonable when it is adopted in *good faith.* In *Fairchild v. Bank of America,* 192 Cal. App. 2d 252, 256, the Court stated that it would not intermeddle

> "with the internal affairs of a corporation in the absence of *fraudulent conduct* on the part of those who have been lawfully entrusted with the management and conduct of its affairs." (Emphasis added).

In this instance, appellant asserted that the Board did not act in good faith, but amended the by-laws for the sole purpose of excluding appellant's nominee from the Board. Appellant further asserted the Board's ac-

tion was taken to prevent the election of any independent Director, who would have access to the books of the corporation, and power to review the acts of management, and the "closed" Board of Directors. Certainly, the Board action to prevent election of independent Directors would violate every principle of corporate democracy, and exceed the limitations placed upon Directors by federal and state law. The averments in the affidavits filed herein clearly raise material facts that warrant a full judicial hearing.

Conclusion.

It is respectfully submitted that the Court below erred in granting a summary judgment for appellee and that said judgment should be reversed and the case remanded for trial upon the merits.

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By THOMAS R. MITCHELL and
CHARLES G. WARNER,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Thomas R. Mitchell

APPENDIX.

Section 1.3. *Nominations for Director.* Nominations for election to the Board of Directors may be made by the Board of Directors or by any stockholder of any outstanding class of capital stock of the Bank entitled to vote for the election of directors. Nominations, other than those made by or on behalf of the existing management of the Bank, shall be made in writing and shall be delivered or mailed to the President of the Bank and to the Comptroller of the Currency, Washington, D. C., not less than fourteen days nor more than fifty days prior to any meeting of stockholders called for the election of directors, provided, however, that if less than twenty-one days' notice of the meeting is given to shareholders, such nomination shall be mailed or delivered to the President of the Bank and to the Comptroller of the Currency not later than the close of business on the seventh day following the day on which the notice of meeting was mailed. Such notification shall contain the following information to the extent known to the notifying shareholder: (a) the name and address of each proposed nominee; (b) the principal occupation of each proposed nominee; (c) the total number of shares of capital stock of the Bank that will be voted for each proposed nominee; (d) the name and residence address of the notifying shareholder; and (e) the number of shares of capital stock of the Bank owned by the notifying shareholder. Nominations not made in accordance herewith may, in his discretion, be disregarded by the Chairman of the meeting, and upon his instructions, the vote tellers may disregard all votes cast for each such nominee.

(Prior to amendment January 4, 1967)

Section 1.3. *Nominations for Director.* Nominations for election to the Board of Directors may be made by the Board of Directors or by any stockholder of any outstanding class of capital stock of the Bank entitled to vote for the election of directors. Nominations, other than those made by or on behalf of the existing management of the Bank, shall be made by notification in writing delivered or mailed to the President of the Bank and to the Comptroller of the Currency, Washington, D. C., not less than fourteen (14) days or more than fifty (50) days prior to any meeting of stockholders called for the election of directors, provided, however, that if less than twenty-one (21) days' notice of the meeting is given to shareholders, such nomination shall be mailed or delivered to the President of the Bank and to the Comptroller of the Currency not later than the close of business on the seventh day following the day on which the notice of meeting was mailed. Such notification shall contain the following information as to each proposed nominee and as to each person, acting alone or in conjunction with one or more other persons, in making such nomination or in organizing, directing or financing such nomination or solicitation of proxies to vote for the nominee: (a) the name, age, residence address, and business address of each proposed nominee and of each such person; (b) the principal occupation or employment, the name, type of business and address of the corporation or other organization in which such employment is carried on of each proposed nominee and of each such person; (c) if the proposed nominee is an attorney, a statement as to whether or not either he or any attorney or firm with whom he has an office relationship as partner, associate, employee, or otherwise, is an attorney for any

banking corporation, affiliate or subsidiary thereof, or bank holding company engaged in business in California; (d) a statement as to each proposed nominee and a statement as to each such person stating whether the nominee or person concerned has been a participant in any proxy contest within the past ten years, and, if so, the statement shall indicate the principals involved, the subject matter of the contest, the outcome thereof, and the relationship of the nominee or person to the principals; (e) the amount of stock of the Bank owned beneficially, directly or indirectly, by each proposed nominee or by members of his family residing with him and the names of the registered owners thereof; (f) the amount of stock of the Bank owned of record but not beneficially by each proposed nominee or by members of his family residing with him and by each such person or by members of his family residing with him and the names of the beneficial owners thereof; (g) if any shares specified in (e) or (f) above were acquired in the last two years, a statement of the dates of acquisition and amounts acquired on each date; (h) a statement showing the extent of any borrowings to purchase shares of the Bank specified in (e) or (f) above acquired within the preceding two years, and if funds were borrowed otherwise than pursuant to a margin account or bank loan in the regular course of business of a bank, the material provisions of such borrowings and the names of the lenders; (i) the details of any contract, arrangement or understanding relating to the securities of the Bank, to which each proposed nominee or to which each such person is a party, such as joint venture or option arrangements, puts or calls, guaranties against loss, or guaranties of profit or arrangements as to the division of losses or profits or with respect to the giving or withholding of proxies,

No. 22065

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

McKee & Co., a partnership,
Plaintiff and Appellant,

vs.

First National Bank of San Diego, a national banking association,
Defendant and Appellee.

On Appeal from the United States District Court for the Southern District of the State of California.

APPELLEE'S BRIEF

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* The Opinion of the District Court is incorporated in this Brief by reference, and all page references with an asterisk (*) are to the Record where said Opinion is set forth.

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IN THE

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McKee & Co., a partnership,
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Defendant and Appellee.

On Appeal from the United States District Court
for the Southern District of the State of California.

APPELLEE'S BRIEF

THE FACTS OF THE CASE

The bylaw amendments in question prescribe qualifications for directors and add to information previously required to be submitted by shareholders in nominating candidates for election as directors. This additional information must show that the nominee meets the qualifications for board members. In addition, information required by the Regulations of the Comptroller of the Currency (12 C.F.R. 11.5) to be filed with the Comptroller and the Bank in election contests must also be submitted [R. 196, 197].

Appellant was notified immediately of all amendments and

submitted timely nominations accompanied by statements containing the required information. Appellant's nominations were made in full compliance with all procedural requirements [R. 197, 198].

The time for filing nominations expired on January 11, 1967, and the meeting was scheduled for January 25, 1967. Appellant claims that it had insufficient time in the six days between being notified of the amendments and January 11, 1967, to find a qualified, willing candidate. However, no effort was made in the two weeks between January 11 and the meeting to find such a candidate, and no request was made of the president to exercise his discretion to accept a late nomination [R. 158, 198], a discretion which is set forth in the bylaw itself [R. 198, 203].

SUMMARY OF ARGUMENT

The bylaws are permitted by law and are inherently reasonable on their face, even without reference to the affidavits. Motive and intent are irrelevant to the question of the validity of bylaws. Rather, bylaws are tested by the objective standard of whether they are reasonably designed to promote a legitimate end, without discrimination among persons equally situated. A discriminatory application of valid bylaws may be illegal, but no such discrimination exists in this case.

In any event, Appellant contends that the motive and intent in this case was to prevent election of *specifically* proposed nominees; and the uncontroverted affidavits [R. 63-64, 67-71 and 97-99] and Findings of Undisputed Facts [R. 198-199] clearly establish the valid purpose and good faith of the directors in protecting the Bank's reputation and strength as being a wholly local bank with knowledgeable and functioning directors, and

protecting the Bank against having directors with a potential conflict of interest with the Bank's competitors.

As for the timing of their adoption, the chairman had express discretion to accept late nominations, and Appellant made no attempt after the original deadline to find qualified nominees or seek permission to file late nominations. Rather, Appellant chose to continue with its unqualified nominees, claiming that the qualificational bylaws were invalid on their face.

Finally, Appellant's claim for money damages is in the category of special damages which are not specifically stated, either in the complaint or by affidavit. Moreover, in the matter of corporate bylaws, the approach is to balance the interests or "rights" of the corporation against those of the shareholder. The Bank's interest in this case far outweighs the limited restriction placed on the shareholders' right to nominate; and thus, Appellant is not entitled to either money damages or equitable relief.

ARGUMENT

Inasmuch as the District Court's opinion contains a thorough discussion of the issues and applicable law, for the sake of brevity said opinion is hereby incorporated by reference [R. 169-195][1] and this brief will be directed primarily to the arguments advanced and the cases cited by Appellant.

I.

The Reasonableness of the Bylaws Can Be Determined on Summary Judgment.

The opinion of the Court below cites ample authority for

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[1] The copy of the record furnished to us did not contain Pages 18 and 21 of the Opinion, which would have been designated as Pages 185a and 188 of the Record. Copies of said pages are therefore being submitted simultaneously with this Brief.

the general rule that the reasonableness of bylaws is a question of law for the court. Nevertheless, any additional facts needed to support their reasonableness in this case were before the Court in the form of the pleadings and uncontroverted affidavits. There is no issue as to the material facts set forth in the Findings of Undisputed Facts [R. 196-199] and summary judgment was therefore proper.

In *Bennett* v. *Hibernia Bank,* 47 Cal. 2d 540, 305 P. 2d 20 (1956) [Appellant's Opening Brief, p. 18], the court, in reversing the sustaining of a demurrer without leave to amend, stated that reasonableness depends on the circumstances, but also indicated that the relevant circumstances were the purposes for which the corporation was organized and the extent of the rights of the shareholder involved. The court was not referring to the motives or intention of those passing the bylaws, but of the type of *objective* facts which are apparent in most cases and which, in addition, are *established* in our case. In the *Bennett* case, the bylaw of a mutual savings bank provided for termination of membership on withdrawal of funds. The court was not satisfied, on the complaint alone, that the bylaw had a reasonable purpose. There is no indication, however, that a motion for summary judgment, supported by affidavits showing the purpose of the bank and the reasonable need for the bylaw, would not have been appropriate. There, the bylaw was quite unusual. In our case, the bylaws are inherently reasonable on their face. Moreover, the Findings of Undisputed Facts, which were not questioned by Appellant, establish the policy of the Bank and the danger which the bylaws were designed to avert. The test of legality is an objective one and the "facts and circumstances" are established in our case without the necessity of trial or the extensive discovery proceedings in which Appellant seems so anxious to engage [Appellant's Opening Brief, p. 24 and R. 137].

In fact, an almost identical situation to the *Bennett* case was before the court in *Spencer* v. *Hibernia Bank,* 186 C.A. 2d 702, 9 Cal. Rptr. 867 (1960). There, the court sustained a *summary judgment* in favor of defendant, expressly following the *Bennett* case and holding that a bylaw eliminating descendability of shares was reasonable under the circumstances, considering the purpose of the corporation and nature of the right involved. Thus, in the unusual case where the reasonableness of a bylaw might not be apparent on its face, the circumstances can be shown by affidavits. The bylaws in our case, however, are like those in the substantial majority of cases where the general rule is applicable—they are reasonable on their face and their validity is a question of law. If not, then the uncontroverted affidavits and unquestioned Findings of Undisputed Facts establish their reasonableness beyond any doubt.

II.

The Bylaws Are Reasonable in Their "Application."

A review of the cases cited by Appellant for the proposition that bylaws must be reasonable in their "application" readily demonstrates that this language refers to their *general* application, and the requirement is that they do not discriminate among persons equally situated. Any director qualificational bylaw by definition excludes some people, and the questions are whether the criteria are reasonable and whether the bylaws are *enforced* against all shareholders.

In *People's Home Savings Bank* v. *Superior Court,* 104 Cal. 649, 38 Pac. 452 (1894) [Appellant's Opening Brief, p. 15], a bylaw provided that only a shareholder of the corporation could be appointed as proxy holder. This was held invalid as contrary to § 312 of the Civil Code (now § 2225 of the Corporations Code) which provided that a shareholder may be represented

at all elections by proxy. The court stated that to give the corporation power to say who the proxy must be would give it power to throttle the statute. In saying that bylaws must not be unreasonable in their "practical application," therefore, the court was referring to their general application to all shareholders, and the bylaws were unreasonable *on their face* as repugnant to the statute.

In *Selama-Dindings Plantations, Ltd.* v. *Durham,* 216 F. Supp. 104 (D.C. Ohio 1963), aff'd. 337 F. 2d 949 (6th Cir. 1964) [Appellant's Opening Brief, p. 15], bylaws prohibiting the recording of board meetings by anyone other than management and forming an executive committee excluding minority directors were upheld in view of the disrupting antagonism at board meetings between majority and minority directors. Since the bylaws were *upheld,* there was no question of "practical application" to indicate what the quoted language meant. Moreover, the bylaws were specifically and expressly aimed at existing minority directors. Such patent discrimination should require a further factual showing to substantiate reasonableness.

Appellant cites *Lindsay-Strathmore Irrigation District* v. *Wutchumna Water Co.,* 111 C.A. 688, 296 Pac. 933 (1931), for the proposition that a bylaw adopted for the sole purpose of excluding a shareholder from enjoyment of the rights represented by his stock is invalid [Appellant's Opening Brief, p. 21]. Besides being directly contrary to the holding in the *Selama-Dindings Plantations* case immediately above, the case did not so hold. After plaintiff had acquired his stock in a water company, the sole purpose of which was to supply water to its shareholders, a bylaw was passed prohibiting use of water outside a certain area, *except* for those who were so using it at the time. At least one-third of the water was then used outside of the area and the bylaw therefore by its express terms applied *only* to the plaintiff.

The court stated that bylaws must operate equally on all persons *of the same class.* The bylaw, on its face, obviously was an invalid discrimination between persons equally situated, and the case was therefore similar to the *Yick Wo* situation discussed in the District Court's opinion [R. 189-90] where there was discriminatory enforcement of a law purporting to cover all persons. There is no such discrimination in our case, for the bylaws apply equally to all shareholders and have not been applied in an unequal or discriminating manner between persons in similar circumstances [R. 198].

III.

The Fiduciary Duty of Directors to Minority Shareholders is Simply Part of the Duty Owed to the Corporation and All Shareholders to Act in the Best Interests of the Corporation.

Section 820 of the California Corporations Code sets forth the fiduciary duty as follows:

> "Directors and officers shall exercise their powers in good faith, and with a view to the interests of the corporation."

Note that there is no requirement that the interests of minority shareholders be served. The interests of the *corporation* are paramount, and if the interests of a minority shareholder could be detrimental to the interests of the other shareholders and the corporation, it is the duty of the board to protect the interests of the majority. The cases cited by Appellant [Appellant's Opening Brief, pp. 25-26] involve economic dealings between directors and minority shareholders where the interest of the majority or the corporation is not even involved.

One of the cases cited by Appellant [Appellant's Opening Brief, p. 27] sets forth the rule very well. In *Fairchild* v. *Bank of America,* 192 C.A. 2d 252, 13 Cal. Rptr. 491 (1961), the court quotes the applicable law at p. 257:

> "In the absence of fraud, breach of trust or transactions which are *ultra vires,* the conduct of directors in the management of the affairs of a corporation is not subject to attack by minority stockholders in a suit at equity, where such acts are discretionary and are performed in good faith, reasonably believing them to be for the best interest of the corporation . . . Every presumption is in favor of the good faith of the directors. Interference with such discretion is not warranted in doubtful cases . . .
>
> "To warrant interference by a court in favor of minority stockholders . . . a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interest, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company [citations omitted]."

Again, the Findings of Undisputed Facts, based on the pleadings and uncontroverted affidavits, establish without question that the directors were acting to prevent what they considered to be a danger to the Bank—to prevent persons from coming on the board with a potential conflict of interest and who would endanger the basis for the Bank's reputation and strength. Although motive is irrelevant to the question of reasonableness (see in particular the *Stockholders' Comm. for Better Man* case, discussed in the District Court's opinion, R. 186-187), the affidavits nevertheless clearly establish the valid purpose and good faith of the directors in preventing election of the *specific* candidates proposed by Appellant who posed a threat to the interests of the Bank.

Appellant states in its brief [Appellant's Opening Brief, p 28] that it has asserted that the board acted to prevent election of *any* independent directors. Such an assertion appears nowhere in the pleadings [R. 2-7, 132-134], and the bylaws on their face could not possibly accomplish such a result. They exclude only those persons with possible adverse interests, and do not prevent Appellant from nominating qualified persons.

IV.

Appellant Has Alleged No Compensable Damage.

A. Special Damages Are Not Alleged or Set Forth in the Affidavits.

Assuming, for the purposes of argument only, that Appellant has shown a wrongful act of Bank, it still has alleged no compensable damage. The complaint merely alleges general damages, and neither the complaint nor the supporting affidavits indicates the nature of the alleged damage for which $50,000 is asked [R. 134].

Rule 9(g) of the Federal Rules of Civil Procedure requires that special damages be specifically stated. The applicable rules of pleading are set forth in 22 Am. Jur. 2d, *Damages,* pp. 31-32, 366-369: General damages, as distinguished from special damages, need not be specifically pleaded. General damages are those which are the "natural and necessary" or "probable and necessary" result of the wrongful act. They must result from the wrong, directly or proximately, and without reference to the special character, condition, or circumstances of the person wronged. Special damages, on the other hand, denote such damages as arise from the special circumstances of the case. They are the natural, but not the *necessary* result of an injury. Such damages must be specially pleaded to warrant their recovery. It

must appear *from the facts pleaded* that the special damages were the direct, natural and reasonable consequence of the act complained of; and an allegation by way of conclusion that they were the direct result and consequence of the wrong is insufficient.

The $50,000 damage alleged by Appellant is obviously in the category of special damages, for it is inconceivable that monetary loss would "naturally and necessarily" result from failure to elect two of nineteen members to a board of directors for a period of only one year. There is absolutely no indication in the pleadings or affidavits as to what Appellant's alleged damage consisted of; what pecuniary profit Appellant expected to gain from one year's board representation; or any lessening in the value of Appellant's stock. In fact, insofar as events occurring subsequent to the judgment are material to this appeal [Appellant's Opening Brief, p. 7, n. 1], Appellant has sold all of its 84,670 shares for $41.50 a share, or a total of $3,513, 805, the transfer of such shares having been completed on October 23, 1967. Appellant's affidavit [R. 35 and 36] and complaint [R. 6] show that on January 9, 1967, said stock was worth approximately $2,593,000. Appellant thus made a profit of approximately $920,000 in less than a year, the value of its shares having risen from $30.63 to $41.50 per share.

(Although this question of damages was raised below [R. 93 and 155], the District Court did not pass on it since the bylaws were upheld [R. 192].)

B. Damages Are Not the Appropriate Remedy.

In the matter of bylaws regulating the internal affairs of a corporation, we are essentially dealing with conflicting interests or "rights" of individual shareholders and the corporation, or majority of the shareholders. All bylaws necessarily infringe on

the "rights" of shareholders, officers and directors; and one becomes a shareholder with knowledge that his rights are subject to reasonable restriction by the majority. The approach for determining the validity of a bylaw and the remedy is clearly set forth in the *Tu-Vu Drive-In* case, 61 Cal. 2d 283, 391 P. 2d 828 (1964), and *Spencer* v. *Hibernia Bank, supra.* The interests of the corporation and of the shareholder are to be weighed, and if the corporate interest is stronger, the shareholder's interest, or "right," must give way. There should be no doubt in this case that the interest of the Bank in having directors who reside in the banking area and have no possible conflict of interest is far greater than Appellant's interest in electing two out of nineteen directors for a period of only one year.

V.

Appellant is Entitled to No Relief Based on the Timing of the Amendments.

It is not true that a bylaw can only be waived by unanimous consent of the shareholders as claimed by Appellant. The case cited for this proposition, *Hyman* v. *Stern Co.,* 47 C.A. 605, 191 Pac. 47 (1920), dealt with a close corporation whose bylaws provided that officers' salaries were to be fixed by the board. The two sole shareholders made an oral agreement concerning salaries, with no formal board resolution. The court held the agreement enforceable. There was no mention of a *requirement* of unanimous consent of shareholders to waive a bylaw. Obviously, however, if all shareholders do waive it, the waiver is valid.

18 Am. Jur. 2d, *Corporations,* p. 704, sets forth the correct statement of the general rule—if the board has power to adopt bylaws, it has the power to waive those it has adopted.

Regardless, the bylaw in our case gives the chairman of the

annual meeting *discretion* to determine whether a nomination failing to comply with the procedural requirements is valid [R. 198]. This is set forth in the bylaw itself [R. 202]. Appellant thus had actual knowledge that a late nomination could be accepted, but made no effort to find a qualified nominee or obtain such a waiver.

In weighing Appellant's interest against the interests of the Bank, Appellant's failure, during the fourteen days after the nomination filing date and before the meeting, to make any effort to find a qualified nominee or obtain permission to file a late nomination must be taken into account. In view of the substantial interests of the Bank involved, Appellant should not be allowed to "stand pat" on its nominees [R. 171, 191], claiming that the bylaws are invalid on their face, then claim that it had insufficient time.

But even disregarding this element of the case, all that Appellant lost was the opportunity to elect two out of nineteen board members for a period of one year only. This certainly does not invalidate the bylaws for subsequent years; and balanced against the substantial interest of the Bank in protecting its reputation, strength and confidential information, this right of the Appellant for the one year in question is insubstantial.

In the *Tu-Vu Drive-In* case, 61 Cal. 2d 283, 391 P. 2d 828 (1964), the court, at p. 287, note 5, lists many important shareholder "rights," the impairment of which has been upheld by the California courts, including amendment of articles *abrogating the common shareholders' voting power* by the issuance of preferred shares (*Heller Inv. Co.* v. *Southern T. & T. Co.,* 17 C.A. 2d 202, 61 P. 2d 807 (1936)), a bylaw eliminating the right of shareholders to immediate payment of their proportionate share of the association's net worth (*DeMello* v. *Dairyman's Co-Op. Creamery,* 73 C.A. 2d 746, 167 P. 2d 226 (1946)), and a bylaw

retroactively severing the descendability feature of membership in a bank *(Spencer* v. *Hibernia Bank, supra).*

VI.

Miscellaneous Points Raised by Appellant.

Appellant raises certain points which are either completely irrelevant or erroneous, but cannot be left unanswered. The first, on p. 20 of its brief, is that on the date the amendments were adopted, Appellant could not have sold or transferred its shares to another party for nomination or voting, since the books of the Bank were already closed for voting purposes. Closing the books prior to the meeting, of course, is standard procedure and absolutely essential in order to determine who is entitled to vote. If shares are sold subsequent to that date, it is quite simple for the seller to give his proxy to the new purchaser, thus enabling him to vote. In any event, Appellant gives no reason why this fact is significant or why it makes the bylaws unreasonable.

On pp. 21-22 Appellant claims the Bank did not comply with the regulations of the Comptroller of the Currency, in that copies of the bylaw amendments were not filed with the Comptroller. There is absolutely no such requirement. The regulations quoted by Appellant state that proxy "soliciting" materials furnished to shareholders must be so filed. The bylaw amendments were not sent to shareholders and obviously were not "soliciting" material. Moreover, enforcement of the regulations rests solely with the Comptroller. Section 10.2 of the Regulations (12 C.F.R. 10.2) provides:

> "The enforcement of Parts 10, 11, 15, and 16 of this chapter shall be a function solely of the Office of the Comptroller of the Currency and no provision of the regulation in these parts (Parts 10, 11, 15, and 16 of this chapter) is in-

tended to confer any private right of action on any stockholder or other person against a national bank."

The regulation quoted by Appellant (12 C.F.R. 11.4(b)) is contained in Part 11, namely Section 11.4(b).

CONCLUSION

The principles of corporate democracy do not require that a minority shareholder be permitted to elect a director who fails to meet basic, reasonable qualifications which, in the considered opinion of the persons responsible for the strength and well-being of a bank, are essential. In the matter of bylaws, and consistent with principles of corporate democracy, the majority may make reasonable determinations governing the internal affairs of a bank, and such determinations should not be subject to veto by any minority shareholder. As stated by the court in *Stockholders' Comm. for Better Man* v. *Erie Technological Products, Inc.*, 248 F. Supp. 380, 384 (W. D. Penn. 1965), discussed at length in the District Court's Opinion [R. 186-187]: "Having chosen to embark upon a financial venture on this particular vessel, they have cast their fortunes with the rest of the shareholders on this voyage and are bound by business policies which the legally chosen representatives have taken which affect all shareholders alike."

The byaws in question apply to all shareholders equally. No attempt has been made to prevent nominations by Appellant. The purpose of the amendment is to limit nominees to persons who reside in the banking area and who will not have a conflict of interest due to any connection with another banking organization doing business in California. The standards are objective and any shareholder, including Appellant, who has sufficient votes can elect independent directors to the board.

Even assuming Appellant is correct in its contention that the

timing of the amendments deprived it of the ability to nominate, and that Appellant should not have been required to request the chairman of the meeting to exercise his discretion to accept a late nomination, the proper solution is not to compel the Bank to accept unqualified members on its board, or to award Appellant a completely arbitrary sum of money when it can show no financial loss. We are dealing with the internal affairs of a corporation and the question is not whether Appellant has been harmed or deprived of a right, for bylaws by their very nature place restrictions on the freedom of action and choice of the shareholders, officers and directors. The question is one of *how much* Appellant has been harmed and of balancing the interests of the parties. If the bylaws are reasonably designed to protect legitimate interests of the Bank, Appellant's inability for only one year to nominate two of the nineteen members of the Bank's board is certainly insubstantial in comparison.

Appellant questions the existence of the Bank's practice of having local directors. Although the affidavits of Claude C. Blakemore [R. 97-99, 159-160] eliminate any factual issue on this point (two directors who were long time employees and residents, having moved out of the county after retiring as employees, were retained on the board for a period of time—both of whom are now ineligible), the question is irrelevant; for there would be no impropriety in establishing as a completely new policy the requirement that all directors be residents of a county in which the Bank maintains an office. A determination by the board of directors that such a policy is necessary or desirable for the future welfare of the Bank would not be so unreasonable as to warrant substitution of the Court's judgment for that of the directors.

The bylaw amendments are manifestly just and reasonable, being designed to provide the Bank with a functioning, loyal

board, familiar with the banking area. There is no claim or showing that they have been or will be applied in a discriminatory manner. There is no factual dispute as to the policy sought to be promoted by the bylaws or the circumstances surrounding their adoption. This is therefore a proper case for summary judgment, both as to the future validity of the bylaws and as to their operation in the year in which they were adopted; and the District Court's judgment should be affirmed.

Respectfully submitted,

PROCOPIO, CORY, HARGREAVES
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Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ C. ROBERTSON KIRKLAND

NO. 22066

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY MARTINETTO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

JURISDICTION AND STATEMENT OF THE CASE

The appellant, Timothy Martinetto, was indicted on February 8, 1967, by the Federal Grand Jury [C. T. 2]. 1/

The indictment, which is in one count, essentially charges that the defendant, a registrant of Local Board No. 114, was classified in Class I-O and was notified of such classification; thereafter defendant was ordered by said Local Board to report to Local Board No. 114 at Downey, California, on September 27, 1966,

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1/ "C. T." refers to Clerk's Transcript of Proceedings.

to be given instructions to proceed to a place of employment for civilian work contributing to the maintenance of the national health, safety and interest; and that defendant knowingly failed and neglected to perform a duty required of him under the Selective Service Act and the regulations promulgated thereunder in that he failed and neglected to report to said Local Board as so ordered to do [C. T. 2-3].

Appellant was arraigned on March 6, 1967, entered a plea of Not Guilty, demanded a jury, and, on April 10, 1967, trial was set for June 20, 1967, before the Honorable William P. Gray, United States District Judge [C. T. 7-9, 24].

On June 20, 1967, jury trial commenced and defendant was found guilty by the jury and sentenced, on June 21, 1967, to imprisonment for a period of three years with parole eligibility to be determined under Title 18, United States Code, Section 4208(a)(2) [C. T. 34-36].

Defendant filed Notice of Appeal on June 22, 1967 [C. T. 37], and Motion to Appeal in Forma Pauperis, on June 29, 1967 [C. T. 37-38].

On June 29, 1967, Judge Gray granted an order permitting appeal in forma pauperis, but did not order the preparation of a typewritten transcript, stating that:

> "The request for a reporter's transcript is denied, because there were no issues of fact, the defendant having admitted that he refused to report to the draft board as directed. The only possible

question on review is whether or not the Selective Service record shows that the defendant was accorded due process." [C. T. 40].

Appellant filed an opening brief, and the Government made a motion for an extension of time in which to file appellee's brief on the grounds that appellant's opening brief raised questions which could only be decided by this Court upon a Reporter's Transcript of Proceedings. An order extending time for filing appellee's brief to and including November 20, 1967 was granted on October 18, 1967, and a copy of the Reporter's Transcript has been supplied.

The jurisdiction of the District Court is predicated on Title 50, United States Code, Section 462, and Title 18, United States Code, Sections 3231 and 3237.

This Court has jurisdiction under Sections 1291 and 1294, Title 28, of the United States Code.

STATUTE AND REGULATIONS APPLICABLE TO THIS CASE

Title 50 Appendix, Section 462, United States Code, provides in pertinent part as follows:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or

directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both. . . . "

Title 50 Appendix, Section 456(j) states:

"(j) Conscientious Objectors. -- Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming

exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in Section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of Section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."

Title 32, Code of Federal Regulations, Section 1660, provides in pertinent part as follows:

"1660.20 - Determination of type of Civilian work to be performed and order by the Local Board to perform such work.

"(a) . . . a registrant . . . shall submit to

the Local Board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. . . .

"(b) If the registrant fails to submit to the Local Board types of work which he offers to perform, . . . the Local Board shall submit to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. . . .

"(c) If the Local Board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the Local Board is located or the representative of such State Director, appointed by him for that purpose, shall meet with the Local Board and the registrant and offer his assistance in reaching an agreement. . . .

"(d) If, after the meeting referred to in paragraph (c) of this section, the Local Board and registrant are still unable to agree upon a type of

civilian work which should be performed by the registrant in lieu of induction, the Local Board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1 which is deemed appropriate, . . . "

Title 32, Code of Federal Regulations, Section 1627.3, provides in pertinent part as follows:

"1627.3 Appeal to President.

"When a registrant has been classified by the appeal board and one or more members of the appeal board dissented from that classification, the registrant . . . may appeal to the President within ten days after the mailing by the local board of the Notice of Classification (SSS Form No. 110) notifying the registrant of this classification by the appeal board. . . . "

STATEMENT OF FACTS

Appellant's Selective Service file was received into evidence as Government's Exhibit No. 1 [R.T. 30], 2/ and disclosed the

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2/ "R.T." refers to Reporter's Transcript of Proceedings. The Selective Service File of appellant will continue to be referred to in this brief as "Government's Exhibit No. 1".

following history of his case:

On July 17, 1961, defendant registered with Local Board No. 114, Downey, California (hereinafter referred to as the "Board") [Government's Exhibit No. 1, pp. 1, 2].

On October 12, 1962, the Board was advised that defendant was a full-time college student [Government's Exhibit No. 1, p. 15]. On December 14, 1962 the Board was advised that defendant was no longer enrolled in college [Government's Exhibit No. 1, p. 16].

On February 28, 1964, the Board received from defendant a completed Classification Questionnaire (SSS 100). Defendant indicated at Series VII that he was a Jehovah's Witness and at Series VIII that he was a Conscientious Objector. In regard to his physical condition he indicated that he was "going to an eye specialist" [Government's Exhibit No. 1, pp. 4-9].

On March 11, 1964, the Board received from defendant a completed Special Form for Conscientious Objector (SSS 150). Defendant indicated at Series IV 2(b) that he has "been associated with them (Jehovah's Witnesses) all my life and became a minister in 1957 by water immersion" [Government's Exhibit No. 1, pp. 12, 17-28].

On March 12, 1964, defendant was classified in Class 1-A and notice of such classification was mailed to defendant (SSS 110) [Government's Exhibit No. 1, pp. 3, 12]. Defendant did not appeal this classification within ten days.

On May 1, 1964, defendant reported for his physical

examination and on May 13, 1964, defendant was found acceptable and was so notified (DD 62) [Government's Exhibit No. 1, pp. 12, 29, 37].

On March 19, 1965, defendant was ordered to report for induction into the armed forces on April 27, 1965 [Government's Exhibit No. 1, pp. 12, 30].

On March 30, 1965, the Board received from defendant a letter in which he states inter alia " . . . I have not made an appeal as of yet, but I am doing so now" [Government's Exhibit No. 1, p. 31].

On April 8, 1965, the Board reviewed defendant's request and decided that defendant's induction should not be postponed and defendant was advised of the Board's decision [Government's Exhibit No. 1, pp. 12, 33].

On April 26, 1965, one day before defendant was to report for induction, the Board received a letter from defendant's doctor indicating that defendant was to have a cyst removed from his left hand. Acting upon this information the Board postponed defendant's induction for thirty days [Government's Exhibit No. 1, pp. 3, 12, 35, 36, 71-72].

On July 20, 1965, the Board ordered defendant to report for another physical examination on August 13, 1965. Defendant was again found to be acceptable and was so notified on August 26, 1965 [Government's Exhibit No. 1, pp. 12, 38, 44].

On August 4, and August 30, 1965, the Board received from defendant and defendant's mother various letters regarding

defendant's health [Government's Exhibit No. 1, pp. 39-42, 45, 46, 69]. These were forwarded to the induction station for re-evaluation on September 1, 1965 and returned to the Board on September 14, 1965 with the indication that re-evaluation was not warranted and defendant was so notified [Government's Exhibit No. 1, pp. 12, 48, 56].

On September 17, 1965, defendant was ordered to report for induction on October 5, 1965 [Government's Exhibit No. 1, pp. 12, 48]. On September 23, 1965, the Board received from defendant a letter indicating that he would report for induction but would not submit [Government's Exhibit No. 1, pp. 12, 49-52].

On October 5, 1965, defendant reported to the induction center and, having been found qualified for induction, refused to step forward and be inducted. Defendant's file was submitted to the United States Attorney's Office on October 29, 1965, and prosecution was declined in order that the Local Board could give further consideration to defendant's claim of conscientious objection [Government's Exhibit No. 1, pp. 12-13, 82-95].

On March 10, 1966, defendant appeared before the Board for a personal interview [Government's Exhibit No. 1, pp. 13, 96-98]. Defendant indicated in this interview that he was <u>not</u> a pioneer minister and that he spent about forty-five hours per month on religious work. Following this interview, defendant was again classified in Class I-A and notice of such classification was sent to defendant [Government's Exhibit No. 1, pp. 3, 13].

On March 21, 1966, defendant appealed this I-A classification

and on June 16, 1966 defendant was classified in Class I-O by the Appeal Board in a vote of 3-0, and notice of such classification was sent to defendant (SSS 110) [Government's Exhibit No. 1, pp. 13, 99-102].

On June 21, 1966, the Board mailed to defendant a Special Report for Class I-O Registrants (SSS 152) and this form was returned incomplete on June 30, 1966 [Government's Exhibit No. 1, pp. 13, 104-109].

On June 29, 1966, the Board received from defendant a letter of appeal of the I-O classification [Government's Exhibit No. 1, p. 103]. On June 30, 1966 the Board advised defendant that this classification was the decision of the appeal board [Government's Exhibit No. 1, p. 110].

On July 7, 1966, the Board mailed to defendant a letter setting out three types of appropriate work available for defendant as a I-O registrant and on July 18, 1966 this letter was returned to the Board with the indication by defendant that he did not wish to perform any of the types of work listed [Government's Exhibit No. 1, pp. 13, 112]. Defendant also indicated that he was "going to start in the full-time ministry on October 1, 1966" [Government's Exhibit No. 1, p. 114].

On August 12, 1966, defendant appeared at a meeting with the Board wherein he indicated that he was <u>not</u> a full time minister. The Local Board determined that work as an Institutional Helper at the Los Angeles County Department of Charities was appropriate and available work to be performed by defendant [Government's

Exhibit No. 1, pp. 118-120].

On September 16, 1966, defendant was ordered by the Board (SSS 153) to report to the Board on September 27, 1966, there to receive instructions to report to the Los Angeles County Department of Charities [Government's Exhibit No. 1, p. 13]. Defendant did not report on September 27 as ordered. Instead the Board received a letter from Defendant indicating that he would not report and that work with the Los Angeles County Department of Charities would interfere with his ministry [Government's Exhibit No. 1, p. 128].

On October 12, 1966 the Board received from the Los Angeles County Department of Charities a Form SSS 153 indicating that defendant did not report as ordered and had not reported [Government's Exhibit No. 1, p. 131].

Contrary to the inference in Appellant's Opening Brief, at pages 5-6, that the defendant was not permitted to take the stand and defend on the basis that he was improperly classified, appellant did take the stand and testified at length about his ministry as a Jeohovah's Witness [R. T. 39-76]. He admitted he had informed the Board that he was spending only ten hours a week on his ministry, and had not attained the full time ministry [R. T. 69-70]. Defendant further admitted that he had received the order to report, and had knowingly failed and refused to report, as alleged in the indictment [R. T. 62 and 71].

ARGUMENT

I

THE DANIELS CASE DOES NOT HOLD THAT A JURY MAY DECIDE THE VALIDITY OF A DEFENDANT'S SELECTIVE SERVICE CLASSIFICATION.

Appellant apparently contends that he was not given a "judicial review of his Selective Service Classification" [Appellant's Opening Brief, pp. 6-7 and 10] and although not specifically stated in the opening brief, a review of the record indicates he also attacks the court's instruction to the jury that the only issue decidable by the trier of fact was whether the defendant had been ordered to report for civilian work assignment, and if so, whether he knowingly failed to comply with such order. Although appellant readily admitted his failure to report as ordered, he contended that the jury should not have been precluded from deciding whether or not he was entitled to a ministerial deferment.

In this regard, he cites Daniels v. United States, 372 F. 2d 407 (9th Cir. 1967), as he did below, for the proposition that a registrant who has exhausted his appeals under the Selective Service System is entitled to a review of the propriety of his classification in a court of law by a jury [see R. T. pp. 3-10, 80-83].

The argument made below, and here inferentially, is that since he was not allowed to present to the jury evidence not before the Local Board at the time of classification so that the jury could decide whether his classification was invalid, a judicial review was

denied him by the court below [Appellant's Opening Brief, p. 10].

The specific holding in Daniels was that a Class I-O conscientious objector, who has passed his physical examination, exhausted his board appeal remedies, and been ordered to report to the board for assignment to a civilian employer, may defend a criminal action for failure to so report on the ground that his classification is invalid. Daniels held that such a person has reached the "brink" in the selective service process and would not have to go through the formality of reporting to the board or the civilian employer, before he would be allowed to contest the validity of his classification in a criminal proceeding. But Daniels did not even consider, let alone hold, the question of whether the jury as trier of fact should decide the validity of that classification. The validity of the classification, as Judge Gray pointed out below, is a question of law for the court [R. T. pp. 5-7]. United States v. Jackson, 369 F. 2d 936 (4th Cir. 1966); Reed v. United States, 205 F. 2d 219 (9th Cir. 1953). Once the court is satisfied that there is a basis in fact for the board's classification (as the court did in the instant case, R. T. pp. 83 and 88), the sole issue for the jury is whether or not defendant was ordered to report and if so, did he fail to obey the order. It is not within the province of the jury to consider defendant's eligibility for a ministerial exemption. United States v. Petiach, 357 F. 2d 171 (7th Cir. 1966).

In a criminal prosecution for a refusal to obey the Selective Service Board order "the scope of judicial inquiry into the administrative proceedings leading to defendant's classification is very

limited." Blalock v. United States, 247 F. 2d 615, 619 (4th Cir. 1957). The courts are not to weigh the evidence to determine whether the classification made by the Local Board was justified. The decisions of local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant. Estep v. United States, 327 U.S. 114, 122 (1946).

In the instant case there was such basis in fact for the I-O rather than a IV-D classification.

As the court pointed out in Dickinson v. United States, 346 U.S. 389 (1953), at pp. 394-395:

> "The ministerial exemption, as was pointed out in the Senate Report accompanying the 1948 Act, 'is a narrow one, intended for the leaders of the various religious faiths and not for the members generally.' S. Rep. No. 1268, 80th Cong., 2d Sess. 13. Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister. . . . Each registrant must satisfy the Act's rigid criteria for the exemption. Preaching and teaching the principles of one's sect, if performed part-time or half-time, occasionally or irregularly, are insufficient to bring a registrant under 6(g). These activities must be regularly performed. They must, as the statute reads,

comprise the registrant's 'vocation.' And since the ministerial exemption is a matter of legislative grace, the selective service registrant bears the burden of clearly establishing a right to the exemption (See 32 C.F.R., Section 1622.1(c))."

The burden is on the registrant to show that he is a leader, and not merely an active member of his sect, that he performs his religious duties as a vocation, rather than as an avocation. United States v. Stewart, 322 F.2d 592, 594-595 (4th Cir. 1963).

Appellant failed to satisfy these requirements. At the time the Order to Report for civilian work assignment was issued, appellant was not a full-time minister, nor was he a pioneer minister, nor even a vocation pioneer [Government's Exhibit No. 1, pp. 118-119]. Rather, he was employed in a full-time capacity at Bekins Van and Storage, earning $3.02 to $3.27 an hour [Government's Exhibit No. 1, p. 118]. While the mere fact that secular labor is performed by a defendant is unsufficient to serve as the basis for denial of the exemption, it is a point upon which the relative amount and type of secular activity may permit such a decision. Dickinson v. United States, 346 U.S. 389 (1953).

Here, the evidence supported the trial court's conclusion that defendant's classification was not without any basis in fact. Such a conclusion is a matter of law solely for determination by the court, and the jury was properly instructed to decide only whether or not defendant was ordered to report and if so, whether he failed

to obey the order. Cox v. United States, 332 U.S. 442, 68 S.Ct. 115, 92 L.Ed. 59 (1947).

II

APPELLANT COULD NOT APPEAL HIS CLASSIFICATION WHICH WAS GIVEN HIM AT HIS REQUEST BY THE APPEAL BOARD IN A 3-0 VOTE.

On March 10, 1966, defendant appeared before the Board for a personal interview [Government's Exhibit No. 1, pp. 13, 96-98]. He indicated in this interview that he was not a pioneer minister and that he spent about forty-five hours per month on religious work. Following this interview, defendant was again classified in Class I-A and notice of such classification was sent to defendant [Government's Exhibit No. 1, pp. 3 and 13].

On March 21, 1966, defendant appealed this I-A classification and on June 16, 1966 defendant was classified in Class I-O by the Appeal Board in a vote of 3-0, as the defendant had requested [Government's Exhibit No. 1, pp. 17-20, and 31; R.T. p. 86], and notice of such classification was sent to defendant (SSS 110) [Government's Exhibit No. 1, pp. 13, 99-102].

On June 29, 1966, the Board received from defendant a letter of appeal of the I-O classification [Government's Exhibit No. 1, p. 103]. On June 30, 1966, the Board advised defendant that this classification was the decision of the Appeal Board [Government's Exhibit No. 1, p. 110].

Appellant attempted to characterize this as a procedural defect at the trial, and Judge Gray stated:

> " . . . I am not able to conclude that the procedure was not properly followed in this case. The record shows that the defendant was classified 1-A. He appealed from that and requested a classification of 1-O. That was given to him. Then he seeks to appeal from that classification.
>
> "Well, I think there are two answers to that. One, I don't think that he can appeal from a classification that he himself has requested. That's the first thing.
>
> "The second thing, inasmuch as the reclassification was given on appeal at his request, there is no one to whom to appeal other than the Appeal Board, and the Appeal Board is the one that acceded to his request, and I just don't think there is any basis for further appeal." [R. T. p. 86].

And Judge Gray was clearly correct in saying that there was no further appeal open to the defendant. 32 C. F. R., Section 1627. 3 provides for appeal to the President of the United States <u>only</u> when a registrant has been classified by the Appeal Board <u>and one or more members of the Appeal Board dissented from that classification</u>. 32 C. F. R., Section 1627. 3.

Here, not only was the decision of the Appeal Board

unanimous, thus precluding further administrative appeal, but the Board classified defendant in accordance with his only requested classification - that of conscientious objector.

CONCLUSION

A review of the entire record indicates that there was no error prejudicial to the rights of appellant, and the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.

WILLIAM J. GARGARO, JR.

NO. 22067

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FOR THE NINTH CIRCUIT

ARNOLD DEAN LAHRS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, ARNOLD DEAN LAHRS (hereinafter referred to as defendant) was indicted by the Federal Grand Jury for the Southern District of California, Central Division on November 23, 1966. He was charged with embezzling $26,287.55 from First Federal Savings and Loan Corporation of Long Beach on or about February 25, 1966 in violation of Title 18, United States Code, Section 657 (C. T. 2) 1/.

Defendant pleaded not guilty at his arraignment on January

1/ "C. T." refers to Clerk's Transcript of Proceedings.

9, 1967 (R. T. 1105-06). [2]

On April 19, 1967, defendant was found guilty after a seven day jury trial before the Honorable Jesse W. Curtis, United States District Judge (C. T. 42).

Defendant was sentenced to the maximum of five years imprisonment under Title 18, United States Code, Section 4208(c), on June 19, 1967 (C. T. 60). A motion to appeal in forma pauperis was granted (C. T. 65-66).

The District Court had jurisdiction under Title 18, United States Code, Sections 657 and 3231.

This Court has jurisdiction to review the judgment under Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF FACTS

The bank involved was the First Federal Savings and Loan Association of Long Beach (hereinafter referred to as bank) (R. T. 223). On the morning of Friday, February 25, 1966, defendant prepared a cash balance sheet which showed that $26,000 was in the vault cash drawer (R. T. 229-232). On Monday morning, February 28, 1966, the money was missing. The total loss was $26,287.55 (R. T. 240-244).

The parties stipulated that the bank was federally insured within the meaning of Title 18, United States Code, Section 657

2/ "R. T." refers to Reporter's Transcript of Proceedings.

(C. T. 2, R. T. 148).

The following is a summary of the evidence presented by the government to prove that defendant took the money:

Defendant was employed as operations officer of the bank from May 1, 1962 to February 25, 1966 (R. T. 171). In that capacity he was issued a key to the front door and given the combination to the walk-in vault (R. T. 172). He also had one of two existing keys to the vault cash drawer which was located inside the vault (R. T. 172-173, 214, 232-33). The other key was kept in a safe deposit box in another vault and could not be obtained without the assistance of two other employees (R. T. 214-215).

On Monday, February 21, 1966 defendant was asked to account for his unexplained absence on Wednesday, Thursday and Friday of the previous week (February 16, 17 and 18, 1966). His explanation was unsatisfactory and the bank president said he would discuss the matter with the board of directors (R. T. 149-152). On Wednesday, February 23, 1966, defendant was forced to resign effective the end of the month. It was agreed that Monday, February 28, 1966, would be his last day (R. T. 152-154). Defendant rode to and from work on February 21, 23 and 24, 1966 with a co-worker, Marie Novotny. February 22, 1966 was a holiday (R. T. 225-228).

On Friday, February 25, 1966, the bank was open from 8:30 A. M. to 6:00 P. M. The defendant was assigned to the late shift which worked from 10:00 A. M. to 6:00 P. M. (R. T. 174). He rode to work with Miss Novotny who arrived at his apartment

at 9:15 A. M. Defendant did not come out when she sounded the car horn. She rang the doorbell and defendant came to the door in his shirt and trousers. There was a slight cut on his right arm which has since healed without a scar. He seemed a little more depressed than usual, possibly because he had been drinking. It was apparent that he blamed the bank for terminating his employment. Defendant treated the cut, finished dressing, and they drove to the bank (R. T. 228, 247-250, 656).

Defendant prepared a cash balance sheet or cash count of the money in the vault cash drawer soon after arriving at the bank. His count showed a total of $26,000 in bundled money (R. T. 229-232). Around 11:00 A. M. he turned in his front door key (R. T. 175, 210).

Defendant was out of the bank from noon to 1:30 P. M. When he returned he asked Marie Novotny to recount the money in the vault cash drawer. She objected to this unusual procedure but agreed to it when defendant threatened to strike her (R. T. 235-237). Defendant gave the key to the vault cash drawer to Marie Novotny around 1:30 P. M. and it remained in her possession until she placed it in its usual hiding place in the vault shortly before she left the bank. She opened the vault cash drawer at 4:00 P. M. and nothing was missing (R. T. 254-256).

Another employee entered the main vault about 5:50 P. M., a few minutes earlier than usual, and saw defendant standing at the vault cash drawer which was open. She said:

> "I apparently startled him when I came in because he turned around quickly and closed the door and appeared very nervous.

I was walking into the vault towards where the cash drawer was. He quickly came out going out of the vault. We met each other. Very nervously he went from one side to the other and kind of laughed and left very quickly. (R. T. 298-299).

Marie Novotny saw defendant close the vault at 6:15 P. M. He said he would not ride home with her and she left the bank. When she last saw defendant he was holding a black attache case (R. T. 238-239). He carried it with him when he left the bank. He was the last employee to leave (R. T. 290-291, 294).

The bank is unguarded on weekends (R. T. 291). Defendant had a habit of entering the bank on weekends and cashing personal checks with the money in the vault cash drawer. When Marie Novotny asked him about this on one occasion, "he said that he had run short of funds over the weekend and had taken the liberty of entering the institution and cashing a check." (R. T. 244-245). This was contrary to bank policy (R. T. 272).

On Monday, February 28, 1966, Marie Novotny arrived at defendant's apartment, but he was not home and she went to work without him. Defendant did not show up for work at all that day and the daily count of the vault cash drawer revealed a shortage of $26,287.55. The five and one dollar bills and some change had been left behind (R. T. 239-243).

Some time between Friday and Monday the defendant and the money disappeared. The evidence showed that he was heavily in debt. He owed almost $2,000 on recent cash loans (R. T. 87-

89, 94-97), several hundred dollars in delinquent property taxes (R. T. 135-142), $238.83 to department stores (R. T. 101-102, 107-109), $138 on a stereo (R. T. 114-116), and had a mortgage on his residence (R. T. 123, 134-135).

On his last day at work, Friday, February 25, 1966, he withdrew the remaining balance in his savings account (R. T. 183-184), emptied his safe deposit box (R T. 187-188) and cashed two checks for a total of $240. One of the checks bounced (R. T. 191-192, 194).

Defendant appeared in Chicago, Illinois using an alias, Tom Osborne, during the first week of March, 1966. He told William C. Nagle whom he met at the Mayor's Row Bar, that he was a grain merchant from Lincoln, Nebraska (R. T. 311-314). The next day defendant and Nagle visited several bars and Nagle's apartment. Defendant offered to buy a revolver and an extra British passport from Nagle who had valid passports from three countries (R. T. 320-321). Defendant was unhappy with his accomodations at the Sherman House Hotel and decided to move to the Drake Hotel later in the day. Nagel said:

> "A. . . . (Defendant) had a large suitcase and a little one, a little attache case. He put those in my car and he excused himself for a moment. He said he had to walk across the street to the Greyhound Bus Station. I stayed in the car. He came back and he had a little attache case which was almost similar to the one that he had brought out of the hotel.

"Q. Do you remember anything about the color of the one he brought back from the Greyhound Bus Depot?

"A. I think it was either dark gray or black.

* * * *

"A. I joked with him that he had taken two suitcases over there and left this little one in the Greyhound Bus Station which was a short distance. He said, 'Well, this one is very important. I had it locked down there.' While I was driving off from the curb I glanced over at him and he was opening the little suitcase at that time. . . .

* * * *

"A. I noticed that he had lots of money in the suitcase. There were, from my recollection, $100 bills, $50 bills, $20 bills, and $10 bills. They were stacked along the top of the suitcase.

* * * *

"Q. When you say stacked, will you tell us, please, how?

"A. Well they were in paper wrappers. . . .

* * * *

"Q. You observed all the money. What was said next?

"A. Well, I said, 'My God! Where did you get all that money?' You know I just laughed.

He laughed and said, 'I stole it'. "

(R. T. 322-325).

Defendant discussed the purchase of a bar and offered Nagle $1,000 for the use of his name after learning that Nagle did not have a criminal record (R. T. 327-328). Later, while very drunk defendant placed $2,000 cash in Nagle's pocket. Nagle returned it, saying:

> "'You know, Tom, I have got to give you back this money. You are going to be looking for it tomorrow. You won't remember what you did with it.'
>
> [Defendant] said that is all right, that he wasn't stoned anyway. He laughed again. 'It was stolen anyway' " (R. T. 329-330).

Nagle found a man's wedding ring with some initials on it in defendant's hotel room. Defendant correctly identified his wife and the date of his marriage but told Nagle he "was being too nosey" when questioned about the intitials A. D. L. (R. T. 329-330, 658-659, 708-709).

The next day defendant told Nagle he was leaving for New York (R. T. 331). On the following Thursday, he was again in Chicago and Nagle joined him on a quick trip to Miami at defendant's expense (R. T. 332-333). They flew first class (R. T. 369), stayed at the Dural Beach Hotel and spent substantial sums for food and entertainment (R. T. 334-336). Defendant always paid cash, using $20, $50, and $100 bills. No matter how big the bill he allowed the waitress to keep the change (R. T. 336-338).

Records were introduced which showed that defendant stayed in deluxe hotels in Chicago (R. T. 381-383), St. Louis (R. T. 386-390, 403-406), Washington, D. C. (R. T. 393-399, 409-411, 418-428, 422), San Juan (R. T. 429), and Cape Cod (R. T. 437, 444-446), before renting an apartment with Jerry Bowden in Washington, D. C. at the end of July, 1966. He admitted these trips (R. T. 545). The record indicates that he paid all of his bills with cash. Two witnesses recalled that he used $50 bills (R. T. 437, 446).

On April 1, 1966, defendant met Jerry Bowden in Washington, D. C. He introduced himself as Thomas Osborne and said he was a lawyer from Nebrasks in town on business (R. T 456-457). Later defendant told Bowden that he was from Long Beach and had originally been from Nebrasks. Evidence was introduced which confirmed his former residence as Fremont, Nebraska (R. T. 568).

In September or October, 1966, defendant called his sister in Long Beach. He knew he was in trouble and refused to disclose his location (R. T. 585).

On November 17, 1966, defendant was arrested in Washington, D. C., while using the alias, Thomas Osborne. He readily admitted that his true name was Arnold Dean Lahrs (R. T. 536-538). A search of his apartment disclosed bankbooks for Arnold Dean Lahrs and Thomas Osborne (R. T. 539). Defendant was taken to Federal Bureau of Investigation headquarters where he said that he had been employed by the bank as operations officer

and left in the latter part of February, 1966. He stated that his last day at work was a Friday and that he was scheduled to work on Monday, February 28, 1966, but did not appear. He admitted that the money he had in Chicago could not have been his own and that it could logically be assumed that he took the money from the bank. Later he mentioned that he was supposed to attend a birthday party on his last night in Long Beach and this was confirmed by his sister (R. T. 542-544, 583-584).

Defendant testified that he did not recall threatening to strike Marie Novotny in the bank vault or making a cash count on February 25, 1966 (R. T. 655). However, he remembered turning in his front door key and closing his safe deposit box, although claiming that he did so on Wednesday, February 23, 1966 (R. T. 655-657, 704).

Defendant interposed the defense of not guilty by reason of insanity. His primary contention was that he had no memory of events from late February 24, 1966 until he woke up in Chicago (R T. 649-650). The following evidence was introduced concerning his mental condition:

In December, 1958, seven years before the crime, he was taken to Long Beach Hospital when he became violent while drunk. On the way to the hospital he threatened to jump from the car and said that he had previously tried to jump off a pier (R. T. 561-563). During his hospitalization from December, 1958, to January, 1959, defendant was given six electric shock treatments. He received another shock treatment on October 30, 1959 (R. T.

601-603). On February 18, 1962, defendant was taken to the hospital, apparently in a straitjacket, when he again became violent while drunk (R. T. 632-634, 741, 799-800). Hospital records show an entry for February 19, 1962 which reads: "He can be discharged today. No evidence of psychosis" (R. T. 800).

In June, 1963, defendant was admitted to the Harriman Jones Clinic and soon transferred to Long Beach Hospital (R. T. 564, 751-754, 802-804) after his supervisor at the bank recommended a physical checkup (R T. 697). He had forgotten to close the bank vault one evening (R. T. 622-623) and later sent an unsigned note and a check out of the bank together (R. T. 623-625). Defendant testified that someone else once left the vault open and said that the incident with the note resulted from errors by other employees. He took the blame as their supervisor (R. T. 700-704).

Later that year defendant apparently attempted to run over his brother while very drunk. The incident was never discussed again by them (R. T. 593-597).

Defendant was a heavy drinker. He stated that he "had been making a habit of drinking a great quantity of liquor during the evening" during the period preceding the embezzlement (R. T. 705). He was arrested for drunk driving in 1958, 1959 and 1963 and his license was revoked (R. T. 738).

Defendant was dismissed because of his failure to report for work on February 16, 17 and 18, 1966 (R. T. 151, 273). He testified that his absence was due to his drinking (R. T. 645). On

February 16, 1966, he called Marie Novotny at 4:00 A. M. and asked her to pick him up at the Greyhound Bus Station in Long Beach. Although extremely inebriated, he gave her a check for $100 to cash when the bank opened. She agreed to meet him with the money later that morning and eventually did so. That evening, at his request she met him at a bar and took him home. On the evening of February 17, 1966, he called her to apologize and remembered everything that had happened the previous morning (R. T. 273-276).

Defendant had been drinking on February 24 and 25, 1966, when Marie Novotny arrived to drive him to work. She testified that the liquor did not affect him on February 25, although he smelled of alcohol throughout the day (R. T. 247-248, 252-253), and while at work he had two brief crying episodes (R. T. 250-251).

William Nagle said that defendant did not recognize him when they passed on the street in Chicago subsequent to their trip to Miami (R. T. 337-338, 340).

Defendant lived with Jerry Bowden from July 1966 until his arrest on November 17, 1966. Bowden testified that defendant was often violent while very drunk and once slashed a window screen, apparently in preparation for a jump from their ninth floor apartment (R. T. 470, 489-492).

Dr. Alvin E. Davis, a psychiatrist testified for the defense. He examined defendant on February 7 and March 7, 1967. Each examination lasted about one hour. On March 8, 1966, he

reported that defendant was "legally sane at time of offense, though professedly amnesiac for that time caused by drinking and emotional reaction to termination of employment." (R. T. 782-783, 789). Later he changed his opinion and at the time of trial stated that defendant was insane based upon the last portion of the insanity test which he quoted:

> "His will, the governing power of his mind, has been so completely destroyed that his actions are not subject to it but are beyond his control." (R. T. 778-781, 838)

Several factors contributed to his change of opinion. He learned that the defendant had been given seven electric shock treatments and 124 sodium penothal interviews rather than one shock treatment and 59 interviews as the defendant had reported (R. T. 790-791). In addition he examined records from several hospitals, although he had most of this information when he gave his original opinion (R. T. 790-806). He also relied on several facts which were not in evidence or were contrary to the evidence. For example, he stated that defendant's brother reported that defendant did not recall attempting to run over him (R T. 806). The brother testified that he never discussed the incident with defendant (R. T. 597-598). Also, Dr. Davis said that defendant's sister reported that defendant did not subsequently recall telephone conversations with her (R. T. 795, 807-808). In fact she testified that defendant often called while drunk and they never mentioned the conversations when he was sober. However, she

did discuss one call with defendant and he had a detailed recollection of it (R. T. 569-570). The doctor also stated that defendant's co-worker, apparently Marie Novotny, reported that defendant did not remember several incidents on February 23, 24 and 25, 1966 (R. T. 795, 808-811). The only testimony in the record is her statement that she did not see him from February 25, 1966 to the trial. She did state that he later remembered everything about an incident which occurred while he was drunk on February 16, 1966 (R. T. 275-276). The misinformation was important to his change of opinion, although Dr. Davis admitted that he did not know whether it was in the record (R. T. 823). He said that the information from defendant's sister and brother and Marie Novotny came from defense counsel and not directly from those persons (R. T. 810).

Dr. Seymour Pollack, a psychiatrist testified for the government. He examined the defendant on January 24 and February 9, 1967 for a total of three hours and formed the opinion that defendant was sane (R. T. 852, 883). Dr. Pollack said that defendant was emotionally disturbed and a "heavy, severe and chronic alcoholic". He noted that defendant had a "rather selective memory excluding mainly that Friday, Saturday and Sunday (February 25, 26 and 27, 1966)." He also said that defendant was obviously aware of his true identity while continuing to use the alias, Tom Osborne (R. T. 856-857) and that the blackouts described by defendant are very common among heavy drinkers (R. T. 858-859). In Dr. Pollack's opinion, it is highly

unlikely that defendant was in a dissociative state at the time of the embezzlement (R. T. 880-882, 895). He added that in over twenty years of practice he had seen only one person in a true dissociative state and even that was seriously questioned. The others faked this condition which he said is similar to the Three Faces of Eve situation, sometimes referred to as multiple personalities (R. T. 863-866).

Dr. Pollack said that he was furnished information by defense counsel and Assistant United States Attorney, Jo Ann Dunne (R. T. 935). The information which he received from Mrs. Dunne included hospital records, an electroencephalographic report which described defendant as perfectly normal and information which corresponded to the testimony of William Nagle (R. T. 949-951, 957). Dr. Pollack also was told that defendant admitted that he took the money (R. T. 950-951). The court pointed out that this was not inconsistent with the testimony of William Nagle and FBI Agent Buscher (R. T. 952-953). The defense contended that it was primarily the testimony of FBI Agent Matthew, who stated what he had been told by Jerry Bowden, and that this could be considered for impeachment only (R. T. 951-953). The court ruled that the testimony was in evidence (R. T. 951).

The following is a brief summary of the procedural background relating to some of the issues raised by defendant:

On January 9, 1967 defendant requested copies of statements of prospective witnesses which were contained in prosecu-

tion files. Defense counsel admitted that the request was contrary to the Jencks Act, Title 18, United States Code, Section 3500, and the court denied the motion (R. T. 1106-1108). The government furnished copies of FBI reports and statements of witnesses in advance of their testimony as a courtesy to the defense (R. T. 154-155, 267).

The court called Jerry Bowden as the court's witness, over defense objection, after being advised that he had given contrary statements (R. T. 352-353). The court explained this procedure to the jury, saying that it appeared to the court that his testimony would be material although neither side wished to be bound by it (R. T. 454-455).

Mr. Bowden testified that he did not recall telling the FBI that defendant admitted taking the money. However, he did recall that the defendant said he was charged with more money than he could possibly have taken and that he was glad it was over (R. T. 475-480). FBI Agent Matthew testified that Bowden said defendant had admitted taking some money from a bank in California (R. T. 502). The court told the jury that Agent Matthew was "called for a very narrow purpose, and that is impeachment only" and defense counsel agreed (R. T. 502). The court also stated that there was considerable doubt "whether the testimony of this witness impeaches in any degree or to what degree it impeaches the testimony of Bowden" (R. T. 506).

Defendant also objected to the testimony of FBI Agent Buscher concerning a statement given after his arrest. The

defendant was arrested at his apartment around 9:00 P. M. and advised of his rights. "He said that he did not wish to discuss the matter at this time." (R. T. 537-539). He was taken to the FBI field office and another conversation was held at 10:20 P. M. Defendant admits that he read and signed a waiver of his constitutional rights before the second conversation (Government Exhibit 35) (R. T. 531, 541). The court overruled the objection (R. T. 534).

Dr. Pollack testified that he had received information from defense counsel and the Assistant United States Attorney (R. T. 935). The defendant moved to strike his opinion since it may have been based in part on information concerning an admission to Bowden which, he contended, was in the record as impeachment only. The court denied the motion stating that any discrepancy between the evidence and the facts relied on by the doctor could be argued to the jury (R T. 867-872, 931-933, 951-953). The government moved to strike the testimony of Dr. Davis since his opinion was based on facts not in evidence and the court denied the motion (R. T. 953).

Defendant proposed an insanity instruction based on the American Law Institute (A. L. I.) test (C. T. 36). The court refused to give it and instead gave an instruction which substantially followed Mathes and Devitt, Section 10. 14 (R. T. 1060-1062).

III

QUESTIONS PRESENTED

1. Did the trial court commit prejudicial error, on January 9, 1967, when it refused to allow defendant to inspect written statements and reports of prospective witnesses contained in the government's files?

2. Did the trial court commit prejudicial error when it called Jerry Bowden as the court's witness and allowed him to be impeached by a prior inconsistent statement?

3. Did the trial court commit prejudicial error when it admitted testimony concerning postarrest admissions by defendant?

4. Did the trial court commit prejudicial error by refusing to strike the testimony of Dr. Pollack or grant a mistrial when defendant contended that part of his testimony was based on information not in evidence?

5. Did the trial court commit prejudicial error when it refused to give defendant's proposed instruction on insanity which embodied the American Law Institute test?

IV

ARGUMENT

A. THE TRIAL COURT CORRECTLY REFUSED TO ALLOW DEFENDANT TO INSPECT WRITTEN STATEMENTS AND REPORTS OF PROSPECTIVE WITNESSES CONTAINED IN THE GOVERNMENT'S FILES.

Defendant contends that his Sixth Amendment right to confrontation of witnesses was abridged when he was denied the right to inspect government files prior to his trial. The trial court ruled that the statements requested were covered by the Jencks Act, Title 18, United States Code, Section 3500, which provides that statements or reports of witnesses, other than the defendant, are not available for inspection until after the witness has testified on direct examination. Defense counsel agreed with the trial court's view of the Jencks Act at that time. The Supreme Court has upheld the constitutionality of the Jencks Act. Scales v. United States, 367 U.S. 203, 257-58 (1961). See Palermo v. United States, 360 U.S. 343 (1959); Jencks v. United States, 353 U.S. 657 (1957). This Court upheld the denial of a similar request in Ogden v. United States, 303 U.S. 724, 734 (1962) stating:

> "There is no support for such sweeping discovery under the Federal Rules of Criminal Procedure, the Jencks decision or the Jencks Act. The legislative history of the Jencks Act makes it

explicitly clear that Congress intended to preclude just such broad disclosure of the government's investigative files as the defendant sought here. . . . As to statements relating to the subject matter of the testimony of potential government witnesses not yet heard, the demand was premature. For the same reason it was not error to deny defendant's pre-trial Jencks Act demands for statements of this and other witnesses."

In this case the Assistant United States Attorney provided defendant with copies of Jencks Act statements before each witness testified, although clearly not required to do so. Defendant now contends that he was denied effective cross-examination because he did not have the statements prior to trial. The only example of alleged prejudice cited concerns the testimony of William Nagle who said that he helped defendant move from the Sherman House Hotel to the Drake Hotel in Chicago. The government introduced records of the Sherman House Hotel which confirmed defendant's stay, but defendant is now informed that there are no records under his own name or his alias at the Drake Hotel. The absence of these records was clearly before the jury and, as the trial court held, this slight conflict did not affect a material issue (R. T. 1082).

Finally the record shows that Nagle did not give a statement to the FBI (R. T. 346). Nagle's three-page affidavit of March 21, 1967 (which was obviously not available on January 9,

1967) was given to defense counsel for cross-examination (R. T. 356, 365, 374-377).

Defendant contends that recent Supreme Court cases have extended the right of cross-examination. However, none of these cases involved the Jencks Act. The record shows that defense counsel was given a full opportunity to cross-examine every government witness. No more is required.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT CALLED JERRY BOWDEN AS THE COURT'S OWN WITNESS AND THEN ALLOWED JERRY BOWDEN TO BE IMPEACHED BY THE TESTIMONY OF FBI AGENT MATTHEW.

After hearing from both sides the trial court ruled, over defense objection that it would call Jerry Bowden as the court's own witness (R. T. 352-353). The trial court told the jury that the "witness may have some testimony which would be material and of interest, not only of interest but would have a bearing on this case, and for that reason the court is going to call this witness as the court's witness. Both parties will be entitled to cross-examine the witness as if he were an adverse witness and neither party will be bound by his testimony . . . ." (R. T. 454-455) The government was reluctant to call Bowden when it learned that he intended to testify contrary to his original statements (R. T. 352). The record establishes the materiality of Bowden's testimony to both sides. He provided information about the

defendant's activities from April 1, 1966 until defendant's arrest on November 17, 1966. In addition he testified at length concerning defendant's mental condition and a possible suicide attempt, which was relevant to the defense of insanity. In Arnold v. United States, 382 F. 2d 4, 8 (9th Cir. 1967), this Court said:

> "It should be noted that in this case it cannot be said that the government called the witness solely to inject prior extrajudicial statements into the record. [The witness] was also examined as to her associations with appellant, and her testimony that she had met appellant on a number of occasions prior to the offense was important to the government's case."

The statement clearly applies to the testimony of the court's witness in this case.

The practice of calling a witness as the court's witness is recognized as proper in the federal courts. In the leading case of Litsinger v. United States, 44 F. 2d 45, 47 (7th Cir. 1930), the court said:

> "The second and third assignments of error relied upon attacking the action of the court in calling and examining [three witnesses] and in permitting the government to impeach them by their previous inconsistent statements . . . ."
>
> * * * * * * * * * *
>
> "The rule which permits the trial court to call and examine a witness at the request of the government's attorney is quite a reasonable one and is well

recognized . . . ."

* * * *

"Nor was there error committed in the extent of cross-examination and in the impeachment by proof of inconsistent statements."

Other cases contain similar statements of the rule. Troublefield v. United States, 372 F. 2d 912, 916 n. 8 (D. C. Cir. 1967); Smith v. United States, 331 F. 2d 265, 269-275 (8th Cir. 1964); cert. denied 379 U. S. 824; United States v. Browne, 313 F. 2d 197, 199 (2nd Cir. 1963), cert. denied 374 U. S. 814; United States v. Lutwak, 195 F. 2d 748, 754-55 (7th Cir. 1952), affirmed 344 U. S. 604 (1953). See Annot., Court's Witnesses (Other Than Expert) in Criminal Prosecution, 67 A. L. R. 2d 538. Since it was proper to call Bowden as the court's witness it was proper to impeach him with his prior inconsistent statement. Litsinger v. United States, supra.

None of the cases cited by defendant resulted in a reversal of the conviction and only one of them, Fournier v. United States, 58 F. 2d, 3 (7th Cir., 1932), involved the calling of witnesses by the court. In Fournier the Seventh Circuit's primary criticism was the failure of the record to explain why the witnesses were called by the court, supra, 58 F. 2d at 6-7, and it was held that the error was not prejudicial. The trial court clearly did not abuse its discretion in this case.

The trial court did not commit prejudicial error when it allowed the court's own witness, Jerry Bowden, to be impeached

by the testimony of FBI Agent Warren Matthew. As the court's witness he was subject to impeachment by either party. Defendant implies that the court erred when it failed to tell the jury that Agent Matthew's testimony should be considered only as impeachment of the witness Jerry Bowden and not as substantive evidence. However, the record shows that during Agent Matthew's testimony the following colloquy took place:

> "THE COURT: Very well. But this witness has been called for a very narrow purpose, and that is impeachment only.
>
> "MR. BAIN: That is correct." (R. T. 504)

Shortly thereafter the court said:

> "It is up to the jury to determine, of course, whether the testimony of the witness Bowden has been impeached by the testimony of this witness . . . ." (R. T. 506)

Defense counsel did not request additional instructions.

The weakness of defendant's position on this point is apparent from the record. During defendant's own case he called FBI Agent Richard George to establish that two government witnesses testified contrary to their original statements to the FBI. The Assistant United States Attorney, Jo Ann Dunne, promptly requested an instruction limiting the testimony to impeachment. The record reads:

> "THE COURT: The testimony of Mr. George is in the way of impeachment and his testimony was

admitted for the purpose of impeaching, if it does, the statement of the other witnesses who have testified. You may not consider his testimony for any other purpose but the purpose of impeachment.

"MR. BAIN: Your Honor, may I interpose a comment at this time?

"THE COURT: Yes.

"MR. BAIN: I believe under the changes in the California Code that the evidence can be considered as substantive evidence. That was one of the major changes in the field of impeachment.

"THE COURT: I think perhaps you are right.

"MRS. DUNNE: I will go along with that. I would be delighted to go along with that. Then impeaching or contradictory evidence is admitted substantively?

"THE COURT: All right." (R. T. 611-612)

It is clear from the record that defense counsel asked the court to apply California Evidence Code, Section 1235, which does treat prior inconsistent statements as substantive evidence. Now defendant insists that the trial court erred when it granted his request! This Court should hold that defendant has waived his right to claim error on this ground.

A recent case which may be contrary to the position of the government is People v. Johnson, 68 Cal. Rptr. 599 (S. Ct. 1968) which holds the Section 1235 of the Evidence Code is unconstitutional when applied to criminal cases because it is a denial

of the right to confrontation of witnesses. However, Johnson does not preclude the introduction of impeaching testimony when it is limited to impeachment. The record in this case supports two conclusions: (1) the testimony of Jerry Bowden was limited to impeachment; or (2) defendant waived his right to complain of its use as substantive evidence.

C. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR WHEN IT ALLOWED FBI AGENT BUSCHER TO TESTIFY TO THE POST-ARREST ADMISSIONS OF DEFENDANT.

Defendant was arrested at his apartment in Washington, D.C. at 9:00 P.M. on November 17, 1966 by FBI Agent Bernard Buscher. He was advised of his constitutional rights and questioning ceased when he said "He did not wish to discuss the matter at this time." (R.T. 536-539) Defendant testified that he was allowed to shower, shave, change clothes, finish his laundry, obtain some cash and leave a note for his roommate, Jerry Bowden, which said that he had been arrested and gave a number where he could be reached (R.T. 681-682). Defendant was taken to the Washington, D.C. field office of the FBI and shown a waiver of his constitutional rights (Government Exhibit 35) which, according to his testimony, he read and signed (R.T. 531, 540-541). The conversation began at 10:20 P.M. and continued for a "little over an hour." (R.T. 540, 546). He was described as very rational, very neatly dressed and normal, although slightly

nervous (R. T. 557). Defendant claimed that he was influenced by threats to prosecute his roommate for harboring a fugitive (R. T. 688). Agent Buscher emphatically denied that this was discussed (R. T. 553-554). The trial court (R. T. 534) and, it must be assumed, the jury found that the statements were voluntary. The procedure followed was in accordance with the practice approved by this Court. Kear v. United States, 369 F. 2d 78, 84 (9th Cir. 1966).

Defendant insists that the two interviews were in reality one continuous questioning period. The record shows that they were separated in time and place and defendant was courteously treated in the interim. The fact that Agent Buscher again advised defendant of his constitutional rights shows that he regarded the interviews as separate. Defendant cites Miranda v. Arizona, 384 U. S. 436 (1966), but nothing in that case forbids a second interview of a defendant who first stated that he did not wish to be questioned "at this time". This Court has recently recognized that a subsequent interview is permissible, even though a defendant makes no admissions during the first interview. Coughlan v. United States, 391 F. 2d 371 (9th Cir. 1968). See also Frizell v. United States, _____ F. 2d _____ (9th Cir. No. 21, 433, April 17, 1968).

D. THE TESTIMONY OF DR. POLLACK WAS PROPERLY ADMITTED INTO EVIDENCE.

Dr. Seymour Pollack, a psychiatrist, testified for the government. Defendant urges this court to rule that his entire

testimony should have been stricken because he was told by the Assistant United States Attorney that defendant had confessed to Jerry Bowden. Defendant does not question the good faith of the government since the record shows that this was the testimony expected from Jerry Bowden until shortly before the trial (R. T. 352, 478, 502).

The trial court ruled that defendant could inquire into the bases for Dr. Pollack's opinion and, if he relied on facts not in evidence, argue to the jury that the opinion should be disregarded (R. T. 871). Dr. Davis based his opinion on several facts which were not in evidence, or were contrary to the evidence, and the government's motion to strike his testimony was denied, apparently for the same reason (R. T. 953).

An expert must obtain background information prior to trial in order to give an opinion to the party intending to offer his testimony. At that point nothing is in evidence. In this case, Dr. Pollack was told that Jerry Bowden had confessed. He also received hospital records and information which corresponds to the testimony of William Nagle (R. T. 949-951). Dr. Pollack testified that the information that defendant had confessed was not significant to his opinion since his primary concern was defendant's mental state at the time of the offense. In addition, he did not consider the statement in the context of a confession. He stated that psychiatrists do not rely on any statements attributed to an individual with a severe alcoholic history (R. T. 963-966).

The government submits that this Court should not prevent

a psychiatrist from considering any information which may be relevant to his opinion. A leading case is Jenkins v. United States, 307 F. 2d 637 (D. C. Cir. 1962), (en banc). There the court said, in reversing the trial court because it excluded a psychiatrist's opinion:

> "It is at least as likely, however, that the court predicated its ruling on cases which bar an expert's opinion based upon facts not in evidence unless it is derived solely from his own observations. But we agree with the leading commentators that the better reasoned authorities admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession. The Wisconsin Supreme Court has forcefully stated the policy underlying the application of this rule to medical testimony:
>
> " 'In order to say that a physician, who has actually used the result of . . . tests in a diagnosis . . . may not testify what that diagnosis was, the court must deliberately shut its eyes to a source of information which is relied on by mankind generally in matters that involve the health and may involve the life of their families and of themselves -- a source of information that is essential that the court should possess in order that it may do justice

between these parties litigant.

" 'This court . . . will not close the doors of the courts to the light which is given by a diagnosis which all the rest of the world accepts and acts upon, even if the diagnosis is in part based upon facts which are not established by the sworn testimony in the case to be true.' " 307 F. 2d at 641.

Defendant apparently contends that the opinion of any expert witness who consults with either attorney and learns facts which are ruled inadmissible into evidence, not introduced into evidence or contrary to the evidence at trial must be stricken. Obviously such a rule would severely limit the value of expert testimony since experts would be denied access to all information possessed by either side before trial. The trial court adopted a more reasonable approach when it, in effect, ruled that the weight to be given an opinion based on misinformation is a question for the jury.

The government respectfully suggests that this Court adopt a rule which would allow an expert to consult freely with the party offering his testimony and anyone else who may be of assistance to him. At trial the expert should be required to state his opinion based on a hypothetical question limited to facts in evidence. Any other facts which he considered may be brought out on cross-examination and, if those facts are not in evidence, the jury will be entitled to give less weight to his opinion.

There are additional reasons for affirming the trial court's

refusal to strike Dr. Pollack's testimony. Defendant urged the trial court to allow impeaching evidence to be admitted substantively. He cannot now complain that the evidence was considered by the government's expert witness. See discussion in Section B, supra. In addition, the record does not clearly demonstrate that Dr. Pollack was discussing the defendant's conversation with Mr. Bowden when he referred to a confession. He may have been referring to the testimony of William Nagle which was admitted without objection. Any statements made by defendant to Mr. Bowden are merely cumulative when added to the testimony of Nagle, Bowden and Agent Buscher. Finally, the facts of the "confession" to Jerry Bowden were before the jury. It must be presumed that they were aware of its weakness as evidence of both defendant's guilt and his mental condition.

E. THE COURT PROPERLY REFUSED TO GIVE DEFENDANT'S REQUESTED INSANITY INSTRUCTION WHICH EMBODIED THE A. L. I. TEST.

Defendant requested an insanity instruction patterned after the A. L. I. test. A. L. I. Model Penal Code, Section 4. 01. The court gave an instruction which substantially followed Mathes and Devitt, Section 10. 14, in accordance with this Court's decision in Sauer v. United States, 241 F. 2d 640 (9th Cir. 1957), cert. denied 354 U. S. 940. The question of the proper test for insanity is one of the most passionately debated issues in criminal

law. This Court recently decided to retain the present rule after a thorough discussion of the alternatives. Ramer v. United States, 390 F. 2d 564 (9th Cir. 1968), (en banc). See also Kilpatrick v. United States, 372 F. 2d 93, cert. denied 387 U. S. 922; Maxwell v. United States, 368 F. 2d 735 (9th Cir. 1966); Smith v. United States, 342 F. 2d 725 (9th Cir. 1965). Another discussion of the question is unnecessary in this case. The government's views were set forth at length in the Appellee's Supplemental Brief in Ramer.

In this case the defense of insanity was based on defendant's contention that he had no memory of the period when the theft occurred. Dr. Pollack testified that defendant had "a rather selective memory, excluding mainly that Friday, Saturday and Sunday." (R. T. 861). He implied that defendant was faking a loss of memory, or dissociative state (R. T. 865). The jury apparently believed Dr. Pollack. If the trier of fact is convinced that defendant remembers what happened and that is the cornerstone of the defense, there is no basis for finding him insane under any test. Ramer v. United States, supra at 575.

CONCLUSION

For the reasons stated in the argument, the judgment of the District Court should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE C. COLEMAN, Petitioner-Appellant, vs. LAWRENCE E. WILSON, ET AL., Respondents-Appellees.	No. 22069

APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE C. COLEMAN, Petitioner-Appellant, vs. LAWRENCE E. WILSON, ET AL., Respondents-Appellees.	No. 22069

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court, Northern District of California, to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code, section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code, section 2253. Proceedings in forma pauperis are authorized by Title 28, United States Code, section 1915.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

Appellant was convicted on September 13, 1965, in the Superior Court of the County of Los Angeles, upon his plea of guilty, of two counts of first degree robbery

in violation of California Penal Code section 211. He was sentenced to state prison for the term prescribed by law, the sentences to run consecutively. People v. Willie C. Coleman, No. 304328 (CT 75). He did not appeal from this judgment. Subsequently, however, appellant filed applications for writs of habeas corpus in the Superior Court of San Bernardino County which were denied on November 15, 1965, and December 29, 1965, No. 129122. An application for writ of habeas corpus to the District Court of Appeal, First Appellate District, filed on January 3, 1966, was denied on January 5, 1966. Crim. 5490. His petitions for writ of habeas corpus in the Supreme Court of California were denied on March 22, 1966, Crim. 9827, and February 1, 1967, Crim. 10551. Following the application to the United States District Court discussed below, appellant, on October 18, 1966, filed for relief under Rule 31(a) in the District Court of Appeal, 2nd Appellate District. Relief was denied by that court on October 20, 1966, and his petition for hearing was denied by the Supreme Court of California on December 14, 1966.

B. Proceedings in the Federal Courts

On September 23, 1966, the United States Court for the Northern District of California denied appellant's application for writ of habeas corpus filed in that court, on the grounds that he had failed to exhaust state remedies

because he might have a right to a belated appeal under Rule 31(a), California Rules of Court, No. 45670. (CT 26). On December 15, 1966, a petition for rehearing was denied by the court for the same reason (CT 41-42). Following his unsuccessful petition for this relief in the California courts, as described above, the District Court, on February 10, 1967, entered its order denying relief on all grounds as alleged in the petition in case No. 45670, but granting appellant thirty days in which to amend his petition to reflect all facts surrounding his plea of guilty in relation to the voluntariness of this plea (CT 56-58). On February 23, 1967, appellant filed his amended petition, (CT 59-63), and the court issued an order to show cause (CT 65). Appellee filed a timely return, (CT 66-121), appellant filed a traverse (CT 121-34), and on May 25, 1967, counsel for respondent appeared before the court.

On June 7, 1967, the court entered its order denying the petition for writ of habeas corpus (CT 136-46). On June 28, 1967, appellant filed a petition for rehearing or, in the alternative, a petition for certificate of probable cause to appeal and leave to appeal in forma pauperis (CT 141-47). On July 7, 1967, the court denied the application for rehearing, and granted leave to appeal in forma pauperis (CT 149-50). Subsequently, appellant filed a motion to amend this petition (CT 151-57). Notice of appeal was filed on

July 18, 1967 (CT 158).

STATEMENT OF FACTS

In an information filed on July 23, 1965, appellant, Willie C. Coleman, and a co-defendant, Adolph Bonner, were charged with twelve counts of violations of the California Penal Code: section 187 (murder), count 1; section 211 (robbery), counts 2-7, 9-11; and section 209 (kidnapping for robbery with bodily harm), counts 8, 12. Petitioner was also charged with one prior felony conviction (CT 88-101).

Appellant was arraigned on May 27, 1965, while represented by a public defender, and entered pleas of not guilty (CT 103). On July 7, 1965, on appellant's motion, the public defender was relieved and Dan O'Neill was appointed to represent appellant (CT 104, 105). On July 12, 1967, counsel moved for dismissal of the charges pursuant to section 995 of the California Penal Code (CT 105). On July 29, 1965, the motion was granted as to count one (murder), and denied as to the other counts. (CT 105, 106).[1]

On August 10, 1965, appellant and his co-defendant, each represented by counsel, withdrew their

---

1. The murder charged was that of John Jeter, the third man involved in the robberies with appellant and his co-defendant, Bonner (See CT 88, 110, 112). Counsel succeeded in having the charges dismissed on the authority of People v. Washington, 62 Cal.2d 777 (1965) (decided on May 25, 1965), which changed the California felony murder doctrine (See CT 118).

pleas of not guilty to counts two and seven of the information and entered pleas of guilty thereto. Appellant also admitted the prior conviction charged (CT 107).

The transcript of these proceedings shows that Bonner was examined and entered his plea first (CT 109-10). The proceedings then continued with respect to appellant as follows:

> "MR. O'NEILL: Now with respect to defendant Coleman, your Honor, I have counselled with him and advised him of his constitutional rights and have discussed the charges with him, have discussed with him the alternatives that are open to him in this matter. Mr. Coleman advises me that he desires to make his plea as to counts 2 and 7 of the Information in this case. He also tells me that he wishes to admit the allegations of prior conviction.
>
> "THE COURT: Take the plea.
>
> "MR. MC CORMICK: Your name is Willie C. Coleman, is that correct?
>
> "DEFENDANT COLEMAN: Yes sir.
>
> "MR. MC CORMICK: Mr. Coleman, you understand the charges that have been placed before you and brought you here to Court this morning, do you not?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: And you have discussed this matter with Mr. O'Neill, your lawyer?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: You have indicated, through him, that it is your desire at this time to plead guilty to two counts contained in that Information, the Information being number 304328, the counts being 2 and 7. Count 2 charges you with the crime of robbery and Count 7 charges you with the crime of robbery. Do you understand that?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: And it is your desire at this time to plead guilty to those two Counts, is that correct?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: Mr. Coleman, you are doing that because you believe you are guilty of those two counts?

"DEFENDANT COLEMAN: Yes sir.

"MR. MC CORMICK: There has been no threats or promises made to make you plead guilty, have there?

"DEFENDANT COLEMAN: No.

"MR. MC CORMICK: You're doing it freely and voluntarily?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: Willie C. Coleman, to Count 2 of the Information charging you with the crime of robbery, how do you plead?

"DEFENDANT COLEMAN: Guilty.

"MR. MC CORMICK: And to Count 7 of the Information, charging you with the count of robbery, how do you plead?

"DEFENDANT COLEMAN: Guilty.

"MR. MC CORMICK: Now Mr. Coleman, at the time of these robberies, there was with you a man named Jeter, is that correct?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: And he was armed with a shot gun at the time of these robberies?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: Is that correct?

"DEFENDANT COLEMAN: Yes.

"MR. MC CORMICK: Also, Mr. Coleman, there has been alleged that prior to the time you committed these robberies you were convicted of the crime of assault with the deadly weapon, a felony, in the Superior Court of the State of Arizona on the 10th day of May, 1957. That sentence was pronounced and you served a term of imprisonment therefore in the State Prison.

Do you admit that?

"DEFENDANT COLEMAN: Yes." (CT 111-13).

The court then found the offense to be first degree robbery, and at counsels' request, continued the case to September 13, 1965, for probation and sentence hearing (CT 110-11, 113).

On September 13, 1965, probation was denied, and appellant was sentenced to state prison for the term prescribed by law on each count, such terms to run consecutively. The remaining counts, two of kidnapping and seven of robbery, were dismissed (CT 75).

APPELLANT'S CONTENTIONS

1. Appellant was denied the effective aid of counsel.

2. Appellant's plea of guilty was involuntary.

3. Rule 11 of the Federal Rules of Criminal Procedure is binding on the State.

4. The fact-finding process employed by the District Court is clearly erroneous.

SUMMARY OF RESPONDENT'S ARGUMENT

I. The court correctly found on this record that appellant's plea of guilty was entered voluntarily while he was represented by competent counsel.

II. There was no error in the procedures used by the court to determine that appellant's plea was in fact voluntary; there are no substantial issues of fact to be resolved in an evidentiary hearing.

ARGUMENT

Appellant makes four contentions in his brief before this Court: (1) That he was denied the effective aid of counsel; (2) That his plea was involuntary; (3) That Rule 11 of the Federal Rules of Criminal Procedure is binding in the state; and (4) That the fact-finding process employed by the court was clearly erroneous.

Of these contentions, two are so clearly without merit they may be disposed of summarily. Appellant's first claim, that of lack of effective aid of counsel, is based primarily on his interpretation of section 3005 of Title 18 of the United States Code, which provides for the appointment of two attorneys, on request, in a capital case in the federal courts. This rule, of course, has no application to state procedure. Counsel was appointed for appellant as required by the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). His other "factual" allegations of effective aid of counsel relate to his claim of a coerced plea and will be discussed in that connection. Appellant's third claim, relating to the application of Rule 11, Federal Rules of Criminal Procedure, may also be dismissed summarily. Again, the rules are applicable to federal criminal procedure, not to state procedure. Rule 1, Fed. Rules Crim. Proc.

Since appellant's other contentions, although equally without merit, are not patently erroneous on their

face, more extensive argument is presented.

I

THE COURT CORRECTLY FOUND ON THIS RECORD THAT APPELLANT'S PLEA OF GUILTY WAS ENTERED VOLUNTARILY WHILE HE WAS ADEQUATELY REPRESENTED BY COUNSEL.

In his application, appellant alleged that his pleas of guilty to two counts of armed robbery were involuntary due to coercive pressures: the representations of his attorney that he would receive probation and that a deal had been made with the district attorney to dismiss all other charges; an unjustifiable fear of the death penalty instilled to coerce the plea; lack of knowledge of the consequences of his plea; and the threat of his attorney to withdraw if appellant did not plead guilty.

These allegations are either factually untrue, as shown by the record, or legally without merit. The statements of counsel and appellant at the time the plea was taken show beyond question that the plea was voluntary. As set forth in the Statement of Facts, supra, the record shows that counsel informed the court that he had advised appellant of his constitutional rights, that he had discussed the charges with him, and had informed him of the alternatives available.

The prosecutor, at the direction of the court, then questioned appellant, asking him if he understood the charges,

and if he had discussed them with his attorney. To both questions appellant replied yes. He was then informed that the charges to which the guilty pleas were to be entered were two charges of the crime of robbery, and asked if he understood, he answered that he did. The prosecutor then asked if he desired to enter his plea and if he were doing so because he believed he was guilty. Again he answered yes to both questions. When asked if any threats or promises had made him plead he answered no. Finally, the prosecutor asked if he were entering the plea freely and voluntarily. He replied yes. These questions and answers were given in open court. There was not the slightest indication by petitioner that he had been threatened in any way, and his co-defendant, in the presence of his own counsel, had been questioned and had responded in much the same way.

We submit that on this record appellant's allegations that he was threatened or uninformed cannot be seriously considered to raise any factual issue requiring further consideration.

Appellant attempts to evade the facts of the record by arguing that because a bargain was in fact made and the record does not show this, that the plea was involuntary. However, the law is clear that the fact that a plea was entered pursuant to a bargain does not invalidate the guilty plea. Gilmore v. California, 364 F.2d 916 (9th Cir.

1966); Cortez v. United States, 337 F.2d 699 (9th Cir. 1964). As the court pointed out in Cortez, a guilty defendant must always weigh the possibility of his conviction on all counts and the possibility of his getting the maximum sentence, against the possibility that he can plead to fewer or lesser offenses and perhaps receive a lesser sentence. Id. at 701.

An examination of the entire record on plea taking indicates the obvious: the reason no mention was made of the agreement was because it was unnecessary. Everyone understood the implications of the entry of a plea of guilty on only two counts of an eleven count information. The court did not set a trial date, but a sentencing date. The procedure followed was the usual one, and the questions were asked to make sure the defendants had not been threatened or promised leniency.[2] Thus, appellant's allegations that he was promised probation and that his attorney threatened him are directly refuted by the record. Furthermore, even if there is a remote possibility of a misunderstanding by appellant of the meaning of "promises" and thus this is why he failed to inform the court, the expectation of leniency does not invalidate the plea. Gilmore v.

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2. The question asked the co-defendant Bonner shows this more clearly: "There have been no promises of reward or lesser sentence or probation or anything . . . ." (CT 109).

California, supra; Pinedo v. United States, 347 F.2d 142 (9th Cir. 1965).[3] Appellant also alleges, however, that his attorney gave him 24 hours to decide to plead guilty, and said he would not represent him if he did not. Since by appellant's own statement this "threat" was made 24 hours before trial, the first statement if made was accurate. The second, in view of the fact appellant had already had two different attorneys appointed, is frivolous. Appellant not only stated in open court that he was not threatened, but does not explain how he could have misunderstood the import of the word "threats" when questioned by the Court.

Appellant's principal argument as to how he was "coerced" into entering his guilty plea is that he was under an "unjustifiable" fear of the death penalty instilled to force him to plead guilty, and that because of this fear he was deprived of the ability to communicate with counsel. Under California law, appellant faced a mandatory penalty of either death or life without possibility of parole if he had been convicted of either of the two kidnapping charges.

Appellant, however, argues that this is immaterial

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3. It should also be noted that appellant did not mention this promise in his petition before the California Supreme Court (CT 76-87), nor does he allege that he questioned the prison sentence at the time it was imposed.

because he was afraid for his life because of the murder charge which was dismissed. The record shows that counsel, now under attack for the inadequacy of his representation, succeeded in getting this charge dismissed on July 29, 1965, pursuant to his motion of July 12, 1965. The record shows that petitioner was present on both dates (CT 105, 107).

Fear of the death penalty on the kidnapping charge does not invalidate the plea. The fact that a defendant is confronted by a hard choice and chooses the lesser of two evils does not make his plea of guilty involuntary. Gilmore v. California, supra. Furthermore, to permit a defendant subsequently to attack his plea on such a basis would have the anomalous result of forcing the defendant to trial to face the death penalty of which he was so afraid because the plea which would relieve his anxiety and possibly save his life could not be taken.

In the instant case, by pleading to the two counts of robbery, appellant eliminated the possibility of receiving the death sentence and achieved the possibility of eventual parole. A review of the record of the preliminary examination, available to and considered by the court below, shows that his conviction on these charges was a virtual certainty.[4] The advice of counsel as to the relative issues involved would be grounds for reversal only if his assistance

4. This transcript has been lodged with the court.

to the defendant is "of such a kind as to shock the conscience of the court and make the proceedings a farce, and a mockery of justice." Knowles v. Gladden, 378 F.2d 761 (9th Cir. 1967). This is obviously not the case here.

Finally, appellant alleges that he was not advised of, and was unaware of the consequences of entering a plea, and that the inadequacy of counsel is further shown because no investigation was made of the possible defenses.[5] On this record, such allegations are patently frivolous. Defense counsel informed the court that, "I have counselled with him and advised him of his constitutional rights and have discussed the charges with him, have discussed the alternatives that are open to him in this matter." Appellant now asks this Court to believe that not only did he lie to the Court when he said that he had not been threatened, that his plea was voluntary, and that it was entered because he believed he was guilty, but that counsel also lied to the Court.[6] Even appellant admits that he was informed by counsel

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5. This latter allegation was first made in the traverse, and was based on the fact that counsel in his affidavit had not made an affirmative showing that he had done so. Such conclusionary allegations are entirely insufficient to raise an issue of incompetence of counsel. See Dalrymple v. Wilson, 366 F.2d 183 (9th Cir. 1966).

6. The same information was given to the court by counsel for Bonner who also entered a plea of guilty to the same two charges. That counsel had consulted with each other is not contested by appellant. Thus, we must believe that both counsel were inadequate in giving this advice.

of the penalty for the kidnapping charges made. If he realized that probation would be a deal, he must have been aware that prison was the alternative. Under California law, the term for robbery is indeterminate and was impossible to predict. Thus, we are left with the only possible remnants of his allegation: he did not know the maximum penalty was life. To consider this allegation seriously as the basis for finding an involuntary plea, particularly in view of counsel's affidavit, would make a mockery of the function of the federal courts in protecting the rights of prisoners through habeas corpus.

In order to foreclose the most remote possibility that any substantial factual issue could be raised in the face of this record, appellee obtained, and the court considered, the affidavit of Mr. Dan O'Neill, appellant's defense counsel (CT 118-21). This affidavit, consistent with and in support of the record, shows beyond question that no factual issue exists which would require a further evidentiary hearing to establish that the plea was voluntary and that counsel was adequate.

II

THERE WAS NO ERROR IN THE PROCEDURES USED BY THE COURT TO DETERMINE THAT APPELLANT'S PLEA WAS IN FACT VOLUNTARY: THERE ARE NO SUBSTANTIAL ISSUES OF FACT TO BE RESOLVED IN AN EVIDENTIARY HEARING.

Appellant argues that the court erred by not

holding an evidentiary hearing because the court could not consider an affidavit to make findings of fact where the facts were in conflict. Appellant misunderstands both the function of the court in habeas corpus proceedings and the consideration the court gave to counsel's affidavit in making its findings of fact.

A federal district court has the power to order an evidentiary hearing where it is necessary to decide issues of fact bearing on the constitutionality of the prisoner's detention. Where the court can determine on the basis of the records before it that there are no issues of fact, it need not order such a hearing. Townsend v. Sain, 372 U.S. 293, 312 (1963); Brown v. Allen, 344 U.S. 443, 460-61, 464 (1953). Thus, a Federal District Court may deny an application without an evidentiary hearing, where the record affords an adequate opportunity to do so.

In making this determination, it has been held that the court may not decide substantial disputed issues of fact solely on the basis of ex parte affidavits. Walker v. Johnson, 312 U.S. 275 (1940); Wright v. Dickson, 336 F.2d 878 (9th Cir. 1964). It is, however, clear that the district courts have discretion to use affidavits to determine whether any substantial factual issues exist. Copenhaver v. Bennett, 355 F.2d 417, 421 (9th Cir. 1966). Such was the use made of

the affidavit of counsel in the instant case.[7]

The record in the case, and appropriate inferences to be drawn from it, directly refute appellant's assertions in all important aspects. The only assertion made by appellant which is not legally irrelevant or directly contradicted by the record, including his own statements to the court, is his claim that he was not informed that the maximum possible penalty for first degree robbery is life imprisonment, and even this may be inferred from the record. We submit that such an allegation, inconsistent with the entire tenor of the record, is not sufficient to raise a substantial issue of fact. To hold otherwise would mean that the district courts would be faced with the possible task of providing a de novo federal hearing on every guilty

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7. Because this case is so clearly not within the rationale of Walker v. Johnson--no substantial issues of fact were decided solely on ex parte affidavits--we need not reach the issue of the extent to which the case has been overruled by the subsequent changes in the statute. In Walker v. Johnson, the Supreme Court did not purport to establish a constitutionally based rule relating to affidavits but was interpreting the statute in effect at the time, which provided that the court shall proceed "to determine the facts of the case, by hearing the testimony and arguments. Id. at 285. There is, of course, no Sixth Amendment problem of confrontation involved. The statute was subsequently amended and a section added which provides: "On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. . . ." 28 U.S.C. § 2246. See also, 28 U.S.C. § 2245 (certificate of judge).

Thus, evidence may be taken by affidavit to resolve, presumably, even substantial issues of fact. A fortiori, an affidavit may be used, as in the instant case, to establish that no substantial issues of fact exist.

plea entered in either state or federal courts.[8/]

Moreover, not only is the allegation inconsistent with the record but it is also contradicted by the affidavit of his trial counsel. Viewed in context then, appellant's allegation is contradicted by virtually its only possible source of support. That the District Court under these circumstances determined that no factual issue requiring further inquiry had been presented constituted a proper exercise of the discretion available to it.

An affidavit by defense counsel is a particularly appropriate one for use in such a case. Realistically, appellant could not hope to establish his case without supporting testimony from counsel, and even then, it might not be sufficient. Cf., Wilson v. Rose, 366 F.2d 611 (9th Cir. 1966). However, an affidavit from defense counsel supporting appellant's allegations might, in this instance, have raised issues substantial enough to require a further hearing.

To the extent that minor "disputed" issues of fact, such as the information on penalties given by counsel, was resolved on the basis of the affidavit, we submit this

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8. The magnitude of the possible burden has been recognized by the Supreme Court. See, Townsend v. Sain, supra, at 319: "We are aware that the too promiscuous grant of evidentiary hearings on habeas could both swamp the dockets of the District Courts and cause acute and unnecessary friction with state organs of criminal justice, while the too limited use of such hearings would allow many grave constitutional errors to go forever uncorrected. The accommodation of these competing factors must be made on the front line, by the district judges who are conscious of their permanent responsibility in this area.

is an entirely proper use of an affidavit. The court in Walker held only that substantial disputed factual issues may not be decided solely on the basis of ex parte affidavits. Here, no substantial issue was involved and both the record and counsel's consistent and supplementary statement contradicted the claim, as pointed out by the court below in its opinion. The record supports the finding of voluntariness; the affidavit of counsel is supplementary to the record and removes any possibility that appellant could provide persuasive support for his factual allegations.

Moreover, this use of an affidavit by defense counsel prevents the possible serious consequences to the representation of criminal defendants by competent counsel ethically obligated to give objective and impartial advice. If counsel is to be subjected to an evidentiary hearing attacking his integrity and competence on the basis of such patently frivolous allegations, it will be increasingly difficult for him to make a choice without considering a possible future attack on his professional reputation. Those who will ultimately be the losers are the criminal defendants whose rights the writ of habeas corpus is designed to secure. Cf., Kuhl v. United States, 370 F.2d 20 (9th Cir. 1966); Nelson v. California, 346 F.2d 73 (9th Cir. 1965).

It was noted by the court in the Copenhaver case, supra, that "discretion and flexibility of approach are

essential if the courts are to continue to effectively carry out the great purpose of this writ." Id., at 421.

The court continues with a quotation from Sanders v. United States, 373 U.S. 1, 9 (1963):

> "[E]ach application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational hearing on the propriety of the discharge sought." [quoting from Salinger v. Loisel, 265 U.S. 224, 231 (1924)].

On the basis of this record, it is clear there was no abuse of discretion, that no rational purpose would be served by taking further evidence, and that the finding of the trial court is fully supported. As the court stated:

> "On review of the entire record, it is clear that petitioner was ably represented, that the advice given by counsel was sound, and that it achieved for petitioner what appears to be the best result possible in the circumstances. Petitioner's responses were made in open court, were clear and unequivocal, and gave no indication of any duress or lack of understanding. The Court finds, therefore, that petitioner's plea was not coerced, and that he was adequately represented by counsel." (CT 146).

It is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus be affirmed.

Dated: November 16, 1967.

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Attorneys for Respondents-Appellees.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: November 16, 1967.

Gloria F. DeHart

GLORIA F. DeHART
Deputy Attorney General

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE C. COLEMAN, Appellant, vs. LAWRENCE E. WILSON, Warden, San Quentin State Prison, et al., Appellees.	No. 22069

APPELLEES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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APPELLEES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

TO THE HONORABLE WALTER L. POPE, JAMES R. BROWNING, AND JAMES R. CARTER, CIRCUIT JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Pursuant to Rules 35(b) and 40 of the Rules for Appellate Procedure, Title 28, United States Code, Appellees, Lawrence E. Wilson and the People of the State of California, hereby petition for a rehearing and suggest a rehearing in banc to consider this Court's per curiam order filed in this action on October 8, 1968.

This court, in its per curiam decision, stated that conflicts presented by the petition and the affidavit could not be resolved without an evidentiary hearing, and cited two cases as supporting authority: Machibroda v. United States, 368 U.S. 487, 494, 496 (1962); Wright v. Dickson, 336 F.2d 878, 882-83 (9th Cir. 1964). Wright, in turn, relied also on Machibroda, and on Pennsylvania ex rel. Herman v. Claudy, 350

U.S. 116, 118-119, 123 (1956), and Walker v. Johnston, 312 U.S. 275, 286-87 (1941).

While this Court's statement, as an abstract generality, may be a correct statement of the law as developed in the cases cited, the Court's order is erroneous for two reasons: First, the assertion that the factual conflict is between appellant's statements and his counsel's affidavit overlooks the fact that appellant's statements in all important respects are contradicted, both directly and by appropriate inference, by his own statements either recorded at plea and sentencing or made in documents filed in this Court; and second, the court both misapplied the cited decisions and failed to consider explicit statutory language (28 U.S.C. 2246) by holding, in effect, that no use of an evidentiary affidavit could be made to determine whether there was any substantial issue of fact to be resolved at an evidentiary hearing.

Appellees respectfully suggest a hearing in banc because the questions raised are of substantial importance to the orderly consideration of issues arising in federal habeas corpus proceedings. The practical effect of the Court's decision is to preclude any exercise of discretion by the district court. Every plea of guilty entered in either state or federal proceedings will now be subject to a mandatory evidentiary hearing on the mere artful allegations of a prisoner, despite the fact that his allegations are not only refuted by the record but are assured of no other evidentiary support.

ARGUMENT

The record in this case shows that appellant and a co-defendant, each represented by separate counsel, were permitted to withdraw their pleas of not guilty and enter pleas of guilty to two counts of robbery. Following sentencing, seven additional counts of robbery, and two of kidnapping, were dismissed. Under California law, a death sentence could have been imposed had appellant been found guilty of the kidnapping.

At the time the plea was taken, appellant's co-defendant was examined first, and inter alia, was asked whether there had been any promises of reward or lesser sentence or probation (CT 109). The proceedings then continued with respect to appellant, in pertinent part as follows:

> "MR. O'NEILL: Now with respect to defendant Coleman, your Honor, I have counselled with him and advised him of his constitutional rights and have discussed the charges with him, have discussed the alternatives that are open to him in this matter. Mr. Coleman advises me that he desires to make his plea as to counts 2 and 7 of the Information in this case. He also tells me that he wishes to admit the allegations of prior conviction.
>
> "THE COURT: Take the plea.
>
> "MR. McCORMICK: Your name is Willie C. Coleman, is that correct?
>
> "DEFENDANT COLEMAN: Yes, sir.

"MR. McCORMICK: Mr. Coleman, you understand the charges that have been placed before you and brought you here to Court this morning, do you not?

"DEFENDANT COLEMAN: Yes.

"MR. McCORMICK: And you have discussed this matter with Mr. O'Neill, your lawyer?

"DEFENDANT COLEMAN: Yes.

"MR. McCORMICK: You have indicated, through him, that it is your desire at this time to plead guilty to two counts contained in that Information, . . . Count Two charges you with the crime of robbery and Count Seven charges you with the crime of robbery. Do you understand that?

"DEFENDANT COLEMAN: Yes.

"MR. McCORMICK: And it is your desire at this time to plead guilty to those two Counts, is that correct?

"DEFENDANT COLEMAN: Yes.

"MR. McCORMICK: Mr. Coleman, you are doing this because you believe you are guilty of those two counts?

"DEFENDANT COLEMAN: Yes, sir.

"MR. McCORMICK: There has been no threats or promises made to make you plead guilty, have there?

"DEFENDANT COLEMAN: No.

"MR. McCORMICK: You're doing it freely and voluntarily?

"DEFENDANT COLEMAN: Yes." (CT 111-113).

Appellant's plea was then entered.

Appellant has not denied the accuracy of this record, nor has he made any explanation of his failure to apprise the trial judge of the "threats" made by his attorney if such threats had in fact been made. In such circumstances, the record itself conclusively establishes that no threats were made. It was this record which was relied on by the trial court. See CT 145-46. The affidavit of counsel established, in addition, that no evidentiary support for his allegation could be obtained.

Appellant's allegation that he did not know the consequences of his plea is also refuted by appropriate inferences to be drawn from the record and the papers filed by appellant. The transcript of the proceedings on sentence, quoted above, establish that appellant and his counsel both informed the court that the matter had been discussed and that appellant understood the charges. Counsel informed the court that he had discussed with appellant the alternatives open to him. Appellant admits that he was informed of the penalty for kidnapping. His allegations concerning the expectation of probation compel the inference that he knew a prison sentence was a possibility. The actual term he would serve could not be predicted under California law. Thus, the only remnant of his allegation is that he was unaware that the maximum term was life. In view of this record, that allegation could properly be considered frivolous by the court. The use of an affidavit to establish that, as to this insubstantial factual issue, further inquiry would produce no support for appellant's position is an eminently reasonable exercise of judicial discretion resulting

both in fairness to appellant and a conservation of valuable judicial time, and is entirely in accord with both the letter and the spirit of cases interpreting the duty of a federal district judge in habeas corpus matters.

In Machibroda v. United States, supra, the petitioner moved under Title 28, United States Code, section 2255 (applicable to federal prisoners only) to set aside a plea of guilty on grounds that it had been induced by promises of leniency by the prosecuting attorney. The petitioner filed detailed accounts of promises made by the prosecuting attorney, on three different occasions, identified as to time and place. In addition the petitioner alleged that the prosecuting attorney had told him that if he informed his attorney or the court, "insisted on making a scene," unsettled matters concerning two other robberies would be added to his difficulties. Id. at 489-490. The prosecuting attorney filed an affidavit denying the promises or coercion, but admitting that he told the petitioner that, in testifying at the trial of an accomplice, he was to be given his last opportunity to tell the truth, a factor which might well be considered by the sentencing court. The case is silent as to what transpired at the plea taking, except that the petitioner had stated that his plea was voluntary. Id. at 482 (dissenting opinion). The Supreme Court held that a hearing was required in these circumstances:

> "There will always be marginal cases, and this case is not far from the line. But the specific and detailed factual allegations of the petitioner, while improbable, cannot at this juncture be said to

be incredible. If the allegations are true, the petitioner is clearly entitled to relief. . . ."

If Machibroda is "not far from the line," the instant case is well over on the other side. Here petitioner neither contested the statements on the record nor explained why he made them if they were not true. Thus, the record conclusively establishes that he was not threatened. The record and appellant's statements show that he was told the penalty for kidnapping, and was aware that probation was the alternative to a prison sentence. It is a reasonable inference from these facts and from the statements of both appellant and his counsel that they had discussed the matter, that he was also informed of the maximum penalty for robbery.

Next, the court in Machibroda rejected the government's argument that a hearing would be futile in view of the prosecuting attorney's affidavit because,

> "It is not unreasonable to suppose that many of the material allegations can either be corroborated or disproved by the visitors' records of the county jail, the mail records of the penitentiary to which he was sent, and other sources."
>
> Id. at 495.

In the instant case, a hearing would be the ultimate exercise in futility. The affidavit of counsel shows that appellant's allegations, incredible on the record alone, will not have any evidentiary support. Thus, there is simply no substantial issue of fact to be resolved in a hearing.

The facts in Wright v. Dickson, supra, are also in

sharp contrast to those in the instant case. In Wright, the defendant had entered a plea of guilty without counsel. He alleged that he had not knowingly and intelligently waived counsel. The state filed copies of the Clerk's Transcripts, not the Reporter's Transcripts, of proceedings in the justice court, and in the Superior Court. These transcripts stated that petitioner had been advised of his right to counsel in both courts and that he had waived counsel in Superior Court before entering his plea. An affidavit of the district attorney stated that prior to the entry of the plea, he had advised the defendant that he had the right to be represented by counsel and that the defendant entered his plea freely and voluntarily. Thus, the petitioner's claim that he had not knowingly waived counsel, a legal conclusion, was not directly refuted by either the record or the affidavit. The "fact" in the record which petitioner was allowed to dispute, was, at best, the judge's opinion. Had there been a Reporter's Transcript which established the facts of the hearing, from which the district judge could make his own determination of proper waiver, no challenge to the record could be made. See Walker v. Johnston, supra, at 284.[1/] In the instant case there is no dispute that the record is accurate and no legal conclusions are stated therein.

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1. "By [issuing an order to show cause which the respondent answers] the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from indisputable facts or from incontrovertible facts, such as those recited in a court record, it appears as a matter of law, no cause for granting the writ exists." (Emphasis added).

In Wright, this Court recognized that substantial issues of fact must exist before the district court is required to grant an evidentiary hearing. Id. at 881.[2] To the extent that the opinion may be read to preclude the use of affidavits for any purpose, we submit that it is in error. Walker v. Johnston, supra, relied on by this Court for both of the above propositions, held only that substantial issues of fact could not be decided solely on ex parte affidavits. Walker, where petitioner, as in Wright, entered a plea of guilty without counsel, also involved a claim of unintelligent waiver of counsel. Again, the affidavit referred to was one by prosecuting officials, and there was apparently no transcript to which the court could refer.

In each of these cases, the allegations of the petitioner raised substantial issues of fact which were not contraverted by the record but rather, either wholly or principally, only by the affidavits of prosecuting officials. This is not the factual posture in the situation at issue here.

Finally, this Court has failed to explain or interpret the clear statutory language which provides that affidavits are admissible as evidence, 28 U.S.C. 2246. If they are admissible, obviously they may be considered by the court even in the resolution of substantial issues of fact. A fortiori, they may be considered in determining that no substantial

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2. The court cited Pennsylvania v. Claudy, 350 U.S. 116, 118-19 (1956): An order to show cause may be dismissed without a hearing if the factual allegations are "patently frivolous or false on a consideration of the whole record . . ." This case also involved a plea in the absence of counsel and a claim of waiver; it could not be dismissed merely because a state prosecuting official filed a denial.

factual issue exists. See Copenhaver v. Bennett, 355 F.2d 417 (8th Cir. 1966). Since the section was enacted subsequent to Walker, the issue cannot be resolved by that case even where substantial factual issues are involved.

In Townsend v. Sain, 372 U.S. 293, 319 (1963), the United States Supreme Court recognized the problems involved in evidentiary hearings:

> "We are aware that the too promiscuous grant of evidentiary hearings on habeas corpus could both swamp the dockets of the District Courts and cause acute and unnecessary friction with state organs of criminal justice, while the too limited use of such hearings would allow many grave constitutional errors to go forever uncorrected. The accommodation of these competing factors must be made on the front line, by the district judges who are conscious of their permanent responsibility in this area."

This Court's decision in the instant case takes this discretion away from the district judge and gives it to the prisoner, with the inevitable result that the validity of every guilty plea, state or federal, is open to contest in an evidentiary hearing. That this will both "swamp the dockets of the District Courts and cause acute and unnecessary friction" can hardly be doubted.[3/]

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3. It also encourages perjury, since any claim outside the record assures the prisoner the excitement of a trip to court. See Weller v. Dickson, 314 F.2d 598, 602 (9th Cir. 1963) (Circuit Judge Duniway, concurring). The increased difficulties of rehabilitation should be obvious.

Compelling as these considerations are, there is, in a case such as this where an attack is made on defense counsel, one further consideration which bears directly on those rights of a criminal defendant, the protection of which is the purpose of the writ. Here, a defendant represented by counsel, was advised by that counsel and in response to such advice entered pleas to two counts of a multi-count information. Other charges, including those for which the death penalty was a possible punishment, were dismissed. Counsel informed the court that he had discussed the charges, the alternatives, and his constitutional rights with the defendant. The defendant affirmed this in open court, affirmed that no promises or threats were made, and stated that his pleas were entered freely and voluntarily because he was guilty. All this is indisputably shown by the record. In addition, an affidavit of counsel affirms the correctness of the record. Despite obviously frivolous allegations, a defendant is permitted to place his counsel in the unenviable position of facing his former client in court to defend himself and his reputation. We submit that faced with such a future prospect at the whim of his client rather than in the sound discretion of a judge, few counsel will be able to give that impartial and wholehearted representation which is the defendant's right under the constitution.[4] Thus, a procedure whose purpose is to secure rights will be a major instrument of their effective denial.

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4. A similar problem has been recognized by this Court. See Kuhl v. United States, 370 F.2d 20 (9th Cir. 1966); Nelson v. California, 346 F.2d 73 (9th Cir. 1965).

CONCLUSION

For the above reasons, we respectfully urge this Court to grant a rehearing in banc, and to affirm the order of the district court.

Dated: October 22, 1968.

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No. 22070

In the

United States Court of Appeals

For the Ninth Circuit

FRED W. ALKIRE AND LOIS O. ALKIRE,
Appellants,

vs.

ROBERT A. RIDDELL,
Appellee.

On Appeal from the United States District Court for the Central District of California

APPELLANT'S OPENING BRIEF

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ROBERT A. RIDDELL,
Appellee.

On Appeal from the United States District Court for the Central District of California

APPELLANT'S OPENING BRIEF

INTRODUCTION

This appeal presents a question which for the past several years has been the subject of repeated litigation in the federal courts and the Tax Court. The question is: When will payments based upon the quantity of material extracted from a mineral deposit be considered ordinary income, and when will they be taxed as proceeds from the sale of a capital asset. Although the question has been before it many times, even the Supreme Court has not achieved uniform and harmonious results in the situations

it has passed upon; and the federal courts of appeal and Tax Court have groped for principles which should determine the correct result, coming up with widely divergent views and arriving at decisions which are difficult, if not impossible, to reconcile.

This Court has most recently considered the question in *Gowans* v. *Commissioner* (9th Cir. 1957) 246 F.2d 448, but then on a somewhat unique set of facts. This appeal, therefore, presents to this Court the opportunity to establish some bright lines in this area of uncertainty, rather than to join some of the other courts which, unfortunately, have drawn "gossamer lines" and based their decisions on distinctions "which hardly can be held in the mind longer than it takes to state them."[1]

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on March 20, 1967, by the United States District Court for the Central District of California in favor of the defendant (appellee herein) and dismissing with prejudice the plaintiffs' (appellants herein) complaint for refund of income taxes [CT 93].[2] The underlying action was brought by appellants under the authority of the Internal Revenue Laws of the United States, and the District Court's jurisdiction was invoked under 26 U.S.C. 7422, 28 U.S.C. 1340, and 28 U.S.C. 1346. Venue was determined under 28 U.S.C. 1391 [CT 2; Amended Findings of Fact Nos. 1, 2, 3, 4, 5, 6 and 7, CT 130-131; Amended Conclusion of Law No. 1, CT 135]. The appellants on March 28, 1967, filed a Motion for Amendment of Findings, for Additional Findings and for Special Finding, pursuant to Rule 52 (b) of the Federal Rules of Civil Procedure [CT 100-101]. Amended Findings

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1. Concurring opinion of Justice Frankfurter in *Burton-Sutton Oil Co.* v. *Commissioner* (1946) 328 U.S. 25, 37-38, 90 L. Ed. 1062, 1070, 66 S.Ct. 861.

2. References preceded by the capital letters "CT" are to the Clerk's Transcript of Record. References preceded by the capital letters "RT" are to the Reporter's Transcript of Proceedings. The judgment, apparently through a clerical error, refers to the years in issue as 1958, 1959, 1960, and 1961, whereas in fact the years in issue are 1959, 1960, 1961 and 1962.

of Fact and Conclusions of Law, and an Order Denying Request for Special Finding were thereafter filed on April 18, 1967 [CT 129-138]. The appellants on June 14, 1967, filed a timely Notice of Appeal under Rule 73(a) of the Federal Rules of Civil Procedure [CT 139-140]. This Court's jurisdiction rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is a suit brought by Fred W. Alkire and Lois O. Alkire for a refund of Federal income taxes and interest thereon paid by them for the years 1959, 1960, 1961 and 1962, and for such additional interest as is provided for under 28 U.S.C. 2411(a). [Amended Finding of Fact No. 1, CT 130][3]

The Facts of This Case

On December 7, 1954, a lease (the "December lease" herein) was entered into between The Irvine Company, a corporation ("Irvine" herein), lessor, and the taxpayer, lessee, covering approximately 19.4 acres in the Santa Ana Canyon, Orange County, California. Said lease provided that for a period of fifteen (15) years, or until such time prior thereto as in lessee's judgment it would no longer be profitable to take and remove the materials covered by the lease in commercially paying quantities, the lessee would have the sole and exclusive right to extract, take and remove from the leased premises soil, rock, sand, gravel, and other earthly materials suitable for use in road and highway construction. The lessor's written consent was required before taxpayer could assign the lease or any right or interest therein or in or to taxpayer's business operations on the leased premises [Ex. I; Amended Finding of Fact No. 16, CT 133].

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3. Lois O. Alkire is a party only by virtue of having filed joint returns with her husband. She has played no active part in any of the business transactions relevant to the resolution of this controversy. Fred W. Alkire will be referred to herein as "the taxpayer".

Taxpayer entered into possession of the leased premises on December 7, 1954, and commenced his sand and gravel business operations thereon on December 15, 1954 [Amended Finding of Fact No. 16, CT 133].

On or about March 31, 1955, taxpayer was approached by Mr. E. O. Rodeffer[4] who wished to purchase taxpayer's leasehold estate under the December lease, together with taxpayer's rock crushing plant, truck scales, and leasehold improvements located on the leased premises and used by taxpayer in his sand and gravel business [RT 127-130; 179-180; Exs. 3 and 4]. The taxpayer was insistent that he would not sell his leasehold without at the same time selling his machinery, equipment and leasehold improvements; and Rodeffer was equally adamant that he would not purchase the machinery, equipment and leasehold improvements without the leasehold [RT 183, lines 23-25; 184, lines 1-3; 136, lines 1-5]. The parties, therefore, at all times negotiated for the sale and purchase of the sand and gravel business operation as a whole.

Following negotiations, taxpayer and Rodeffer on May 5, 1955, executed certain "Bulk Sale Escrow Instructions" addressed to Union Bank & Trust Company wherein it was provided that the rock crushing plant, truck scales and leasehold improvements would be purchased by Star Rock Products, Inc. for Sixty Thousand Dollars ($60,000.00) cash, (allocated $50,000.00 to the rock crushing plant, $7,000.00 to the truck scales, and $3,000.00 to the leasehold improvements) if (i) Irvine's approval of the transfer of taxpayer's business operation could be secured and (ii) a new variance permit could be obtained from the County of Orange [Ex. 6]. On May 27, 1955, the parties executed

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4. Mr. Rodeffer was the sole stockholder and President of Star Rock Products, Inc., a California corporation [Amended Finding of Fact No. 8, CT 131; RT 122, lines 10-11; 123, lines 2-4]. In 1960 Star Rock Products, Inc. was merged with eight other corporations in which Mr. Rodeffer owned 100% of the stock, and the name of the surviving entity was changed to Rodeffer Industries, Inc. [Amended Finding of Fact No. 10, CT 131]. For ease of reference, Mr. Rodeffer, Star Rock Products, Inc., and Rodeffer Industries, Inc. will sometimes herein be referred to collectively as "Rodeffer".

an Agreement which provided that taxpayer would surrender to Irvine his December lease in exchange for a new lease from Irvine naming taxpayer and Rodeffer as co-lessees, covering the same property and containing substantially the same terms and conditions; and that upon execution and delivery of the new lease to taxpayer and Rodeffer, the new lease would be assigned by them to Star Rock Products, Inc. The Agreement further provided that from and after the effective date of such assignment, and for so long as Star Rock Products, Inc. continued its operations and produced rock from the leasehold, Star Rock Products, Inc. would pay to taxpayer a "royalty" of leasehold and sold by Star Rock Products, Inc. [Ex. 5]. Three Cents (3¢) per ton of material produced from said The "royalty" was in lieu of a cash sum for the taxpayer's leasehold interest in the deposit, since such a lump sum would have been well beyond the ability of Rodeffer to pay [RT 141, lines 4-25; 142, lines 1-18].

The transaction was handled by means of separate agreements (i.e., the May 5, 1955 Escrow Instructions [Ex. 6] and the May 27, 1955 Agreement [Ex. 5]) because Rodeffer needed to borrow the Sixty Thousand Dollars ($60,000.00) from the Union Bank and had agreed to give the Bank, as security for the loan, a chattel mortgage on the machinery and equipment which he was purchasing from the taxpayer. The Bank and Rodeffer, therefore, were vitally interested in seeing to it that Rodeffer received clear title to the machinery and equipment so that the Bank's chattel mortgage would be a first lien; and thus the phase of the transaction which concerned the machinery and equipment was handled through the escrow at Union Bank. The transfer of the leasehold, however, was not handled through the escrow because Irvine set forth special requirements, and wished to handle the transfer themselves [RT 133-135]. Irvine's requirements were covered in the May 27, 1955 Agreement [RT 160, lines 10-18; 163, lines 12-22; 275, lines 5-19].

On or about June 2, 1955, the consent of Irvine was obtained to the transfer of taxpayer's business operation on the leased premises to Star Rock Products, Inc. [Ex. 7]. The escrow at Union Bank closed on June 7, 1955 [Ex. 9]. On June 17, 1955, the December lease was surrendered by taxpayer to Irvine and canceled and a new lease (the "June lease" herein) was executed naming taxpayer and Rodeffer as co-lessees [Amended Findings of Fact Nos. 17 and 20, CT 133-134; Ex. 8]. On July 9, 1955, an Assignment of Lease was executed, assigning the June lease to Star Rock Products, Inc. [Amended Finding of Fact No. 21, CT 134; Ex. 2]. On July 11, 1955, the Acceptance of the Assignment was executed on behalf of Star Rock Products, Inc. and on the same date the written consent of Irvine to said assignment was executed on behalf of Irvine [Amended Findings of Fact Nos. 22 and 23, CT 134; Ex. 2].

Star Rock Products, Inc. went into possession of the leased premises sometime after July 1, 1955, and commenced its operations thereon [Amended Finding of Fact No. 24, CT 134].

Rodeffer has never been and is not now obligated under any of the Agreements between the parties nor under the June lease to remove any material whatsoever from the sand and gravel deposit [Amended Finding of Fact No. 26, CT 135].

In summary, the taxpayer sold all of the assets of his sand and gravel business operation to Rodeffer. Although both taxpayer and Rodeffer intended the sale of the leasehold estate created by the December lease and of the machinery, equipment and leasehold improvements to be part and parcel of a single transaction, the sale, as a formal matter, was divided into two distinct parts: (i) an escrow for the sale of the machinery, equipment and leasehold improvements, as required by the Union Bank, and (ii) a lease cancellation, execution of new lease, and assignment thereof for the sale of the leasehold estate, as required by Irvine. The sale of the machinery, equipment and leasehold

improvements was completed on June 7, 1955, and the sale of the leasehold estate was completed on or after June 17, 1955.

The total purchase price paid by Rodeffer was Sixty Thousand Dollars ($60,000.00) cash plus a "royalty" of Three Cents (3¢) per ton of material produced and sold from the leasehold, allocated as follows:

(a) Fifty Thousand Dollars ($50,000.00) cash for the rock crushing plant;

(b) Seven Thousand Dollars ($7,000.00) cash for the truck scales;

(c) Three Thousand Dollars ($3,000.00) cash for the leasehold improvements; and

(d) Three Cents (3¢) per ton "royalty" for the leasehold estate.

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in holding that the taxpayer retained an economic interest in the subject sand and gravel deposit [Amended Conclusion of Law No. 3, CT 135].

2. The District Court erred in denying taxpayer's Request for Special Finding [CT 137-138] and in failing, thereby, to find that the "royalty" constituted the purchase price for taxpayer's leasehold interest under the December lease.

3. The District Court erred in rendering judgment for the appellee and dismissing appellant's complaint with prejudice.

QUESTION PRESENTED

Whether a person has made an absolute sale and therefore has not retained an economic interest in a mineral deposit where he and the transferee intend a sale and purchase, where the operative documents use language of

sale and purchase, where the person has retained no property interest of any kind whatsoever in the deposit nor in the land containing the deposit, where he has retained no right to reacquire any interest in the deposit, where the transferee is under no obligation to extract any minerals from the deposit and where the person has received other consideration wholly unrelated to the withdrawal of material from the deposit.

ARGUMENT

SUMMARY OF ARGUMENT

The central issue in this case is whether the sums paid by Rodeffer to the taxpayer during the years in issue represent long term capital gain or ordinary income.[5]

The proper characterization of these receipts for Federal income tax purposes is dependent upon the economic substance and actual effect of the interrelated documents and agreements between the parties. If by these instruments the taxpayer sold his interest in the subject sand and gravel deposit, then the receipts are to be treated as long term capital gain.[6] If, however, taxpayer did not sell his interest in the deposit, then the receipts are ordinary income.

The difficulty lies in determining when there has been a sale by the taxpayer, and when there has been something less than an absolute sale; and the approach to this question in cases involving sand, gravel and other hard mineral deposits has been different from the approach in cases involving oil and gas deposits. In most

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5. The May 27, 1955 Agreement called for the payment by Star Rock Products, Inc. to taxpayer of three cents (3¢) per ton of material produced from the leasehold and sold by Star Rock Products, Inc. or its successor, labeling such payments as "royalties" [Ex. 5, para. 7(a)]. It is settled that the use of the term "royalty" to describe contingent deferred payments to be made to a taxpayer is of no significance in determining the ultimate character of the transaction. *Gowans v. Commissioner,* supra, 246 F.2d 448.

6. There is a subsidiary issue as to whether the taxpayer held his interest in the sand and gravel deposit for more than six months in order to qualify for long term capital gain treatment. This question is discussed at a later point in this brief (see discussion, infra, Part C).

of the cases, both those involving oil and gas and those involving hard minerals, the court states that the tax treatment to be given to the payments in question will depend upon whether the taxpayer sold his interest in the mineral deposit, or whether he retained an economic interest therein, reasoning that the two concepts (i.e., "sale" versus "retained economic interest") are mutually exclusive. In the oil and gas cases, the courts have first examined to see whether the taxpayer retained an economic interest and after making that determination, and based thereon, have concluded whether or not a sale took place. In the sand, gravel and hard mineral cases, on the other hand, the courts have first looked to see whether there has been a sale within the generally accepted meaning of the term and have then, based upon that finding, concluded whether or not the taxpayer retained an economic interest. Thus, in the hard mineral cases, the courts have not resorted to legal fictions, but have applied generally accepted principles in answering the question of whether there has been a sale.

The facts of this case are clear that the taxpayer sold his interest in the sand and gravel deposit to Rodeffer within the generally accepted meaning of the term, and within the meaning of Section 1222 of the Internal Revenue Code. Therefore, based upon the authority of the overwhelming majority of the Circuit Court, Federal District Court, and Tax Court cases involving sand, gravel, and hard mineral deposits, it must be held that the taxpayer did not retain an economic interest in the deposit, and thus the payments received by the taxpayer from Rodeffer are to be treated as long term capital gain.

THE TAXPAYER MADE AN ABSOLUTE SALE OF HIS INTEREST UNDER THE DECEMBER LEASE AND THEREFORE RETAINED NO ECONOMIC INTEREST IN THE SAND AND GRAVEL DEPOSIT

Whether deferred contingent payments based upon the quantity of material extracted from a mineral deposit (sometimes referred to as "royalties", see footnote[5],

> "In view of the interpretation we have given to the agreement [finding a sale] the cases involving the concept of 'retained economic interest', developed in connection with depletion deductions in transactions relating to oil, gas and mineral extraction, are clearly inapplicable. Nor should our conclusion in this case be understood as an indication that we have any views concerning analogous or similar transactions in the field of oil, gas and mineral extraction." [250 F.2d at 198]

In *White* the Court stated:

> "It is apparent from the quoted language [quoting from *Helvering* v. *Elbe Oil Land Dev. Co.*] that the Supreme Court has not intended that the Palmer v. Bender, supra, theory of economic interest is to govern all transfers of mineral interests involving future payments to be made from production." [311 F.2d at 402]

Turning, then, to an individual examination of the cases, we find the following:

1. *The Tax Court*

The most recent case before the Tax Court involving this issue was *Anne Pickard* (1966) 46 T.C. 597. In that case the court found a sale, stressing the fact that the transferee was under no obligation to extract any minerals, and relying heavily upon the authority of *Helvering* v. *Elbe Oil Land Dev. Co.* (1938) 303 U.S. 372, 82 L.Ed. 904, 58 S.Ct. 621

In *Jeanette O. Sager* (1962) T.C. Memo 1962-121, 21 T.C.M. 641, the court likewise found a sale, stating:

> "The petitioners . . . urge that the mere fact that a royalty has been retained does not result in the retention of an economic interest in the property, citing *Helvering* v. *Elbe Oil Land Co.* 303 U.S. 372 (1938). The petitioners contend, therefore, that by their deed

> they made an absolute sale of the minerals in the lands described in the deed and that the sums received on account of the deed should be treated as the sales price of the minerals. We must agree with the petitioners.'' [21 T.C.M. at 643]

Possibly the most lucid opinion of the Tax Court on this point was that in *Charles H. Remer* (1957) 28 T.C. 85, aff'd (8th Circuit 1958) 260 F.2d 337. Looking to the language of the contracting parties and the surrounding circumstances to determine the economic substance of what had been done, observing that the language used was one of conveyance in absolute terms with no reversionary interest retained, and emphasizing that the taxpayer had no right to control the production or to reacquire the leasehold under any circumstances, the Court said (at page 92) that if it were not for his contractual right to receive so much per ton, it would have had no trouble in holding that the taxpayer had transferred all his rights to the property and had not retained any economic interest; and despite the fact that the taxpayer retained a right to payment measured by production, the Court held that there was a sale.

Accord:

C. E. Johnson (1963) T. C. Memo 1963-321, 22 T.C.M. 1682

Maude W. Olinger (1956) 27 T.C. 93

2. *The First Circuit*

In finding a sale, the First Circuit has emphasized the fact that the payments received by the taxpayer were based upon fixed prices per unit extracted without reference to the prices received or profits, if any, made by the purchaser.

> ''Turning then to the 'true substance' of the transactions between this taxpayer and those to whom he gave the right to remove sand and gravel from his property, it is evident that the taxpayer had no 'eco-

nomic interest' in the material taken from his property after its severance, for in every instance he sold sand and gravel for fixed prices per cubic yard without reference to the prices received or the profits, if any, made by the exploiters."

Linehan v. *Commissioner* (1st Cir. 1961) 297 F.2d 276, at 279

3. *The Second Circuit*

The Second Circuit, in finding a sale, has emphasized the intent of the parties and the language used in the instrument, and, as discussed above, has not even given lip service to the economic interest test, denying its applicability to sand and gravel cases.

Barker v. *Commissioner,* supra, 250 F.2d 195, 198

4. *The Fifth Circuit*

The Fifth Circuit, in finding a sale, has emphasized the intent of the parties, and the dominant purpose and essential character of the agreement between them as disclosed by all the evidence.

Crowell Land & Min. Corp. v. *Commissioner* (5th Cir. 1957) 242 F.2d 864, 866

In *Wood* v. *United States* (5th Cir. 1967), 377 F.2d 300, a case involving a "typical" mineral lease in which, naturally enough, it was held that there was no sale and that the taxpayer therefore retained an economic interest in the mineral deposit, the Fifth Circuit confirmed the import of its decision in *Crowell,* stating:

"It would appear, however, that strong emphasis [in *Crowell*] was placed upon the wording of the instrument as a contract of sale. The court reasoned that the instrument unambiguously revealed the true intent of the parties and that such intent was determinative of the issue before the court." [377 F.2d at 310-311]

And the Court further emphasized its point by quoting from *Crowell* as follows (in footnote 24 at page 311):

> "242 F.2d at 866:
>
> 'A bona fide sale was the intent of the parties and it was expressed in terms free from ambiguity throughout the instrument in the provisions and conditions it set out. Looking to the actual circumstances as well as the language of the contract of sale, there is no occasion or basis for resorting to legal niceties of interpretation to defeat the basic purpose and effect of the transaction.' "

5. *The Eighth Circuit*

Like the Fifth Circuit, the Eighth Circuit, in finding a sale, has emphasized the intent and purpose of the parties as evidenced by the terms and conditions of the operative documents between the parties, and has further stressed the fact that the transferee was under no obligation to extract any minerals.

> "It goes without saying that if this was a case where profits resulted from an ordinary sale of the property, the taxpayers properly reported the profits as capital gain. The written assignments were in the language of an absolute sale under warranty of title and contained no provision retaining any interest in the property so sold. The provision in the assignments for the payment of ten cents per ton on such concentrates as might be shipped imposed no obligation on the transferee to ship any ore, and the transferor retained no interest in the ore in place. The consideration to be paid was definite and absolute and the provision with reference to paying ten cents per ton for the ore shipped was simply a method of measuring the added consideration to be paid. The transferor had the bare right to payments measured by production. This did not, we think, result in the transferor retaining an economic interest in the property sold. It was merely

a covenant on behalf of the transferee to pay additional consideration to the transferor."

Commissioner v. *Remer* (8th Cir. 1958) 260 F.2d 337, at 339

In *Rabiner* v. *Bacon* (8th Cir. 1967) 373 F.2d 537, a case involving a "usual and simple form of mining lease" in which, as to be expected, it was held that there was no sale and that the taxpayer, therefore, had retained an economic interest in the mineral deposit, the Eighth Circuit confirmed its decision in *Remer,* stating:

"There is no conflict, however, in our opinion in *Remer* and here because in *Remer* there was involved the actual sale of two stockpile iron ore mining leases. The document in *Remer* was in the language of an absolute sale under warrant of title and contained no provision retaining any interest in the property sold. We held there that this constituted a sale of the leases and that the profits resulting therefrom were entitled to capital gains treatment." [373 F.2d at 539]

6. *The Ninth Circuit*

As stated above, this Circuit in *Gowans* was dealing with a somewhat unique set of facts. The Court found a sale, but stressed some of the unique aspects of that case in supporting its finding. The Court did emphasize, however, that the receipt by the taxpayer of other consideration in addition to the payments measured by production is of prime importance since an economic interest is not retained where the taxpayer receives other consideration wholly unrelated to sand and gravel withdrawals.

Gowans v. *Commissioner,* supra, 246 F.2d 448, 452

7. *The Tenth Circuit*

In finding a sale, the Tenth Circuit has looked to the intent of the parties and the true substance of the trans-

action, emphasizing the fact that the purchaser was not compelled under the contractual arrangements with the taxpayer to extract the minerals; and, as stated above, has denied the applicability of the economic interest test.

> "The Whites retained no investment or interest, economic or otherwise, in the minerals in place. The purchaser was free to remove the minerals, or not, as it saw fit. If there was production, the taxpayer was entitled to an additional payment. In this context the economic interest principle advanced by the United States is wholly a legal fiction."
>
> *United States* v. *White*, supra, 311 F.2d 399, at 402-403

It is true that the court in *White* was called upon to determine the tax treatment to be given a downpayment received by the taxpayer under a mineral deed, and expressly stated that its decision in favor of the taxpayer as to the downpayment would not necessarily control the tax treatment of possible future royalty payments under the mineral deed. Nonetheless, the Federal District Court which was subsequently faced with the question of the tax treatment to be given such royalty payments held that the rationale of the Tenth Circuit in *White* was equally applicable to the royalties, stating:

> "In the case at bar the taxpayers divested themselves of every incident of ownership of the minerals. The Whites could not have compelled the grantees to mine the ore. The decision to proceed or not was entirely that of Denver-Golden under the terms of the deed. Thus, there was no reversionary interest in the Whites whatever, and not a single stick in the so-called bundle of rights remained in them. It follows that there was no such interest, economic or otherwise, in the Whites which would justify the subjecting of these proceeds to ordinary income less depletion.

"Accordingly, we conclude that the ten per cent interest clause is to be viewed as a deferred payment provision."

White v. *United States* (D.C. Colo. 1966) 254 F.Supp. 894, at 896-897

9. *Summary of Decisions*

From the foregoing it is evident that in the solid mineral cases, the courts, while sometimes giving lip service to the economic interest test carried over from the oil and gas depletion cases, have really approached the problem as one involving the general question of whether there has been a "sale", and have rested their decisions upon combinations of such indicia as the intent of the parties (*Sager, Remer, Olinger, Johnson, Barker, Crowell* and *White*), the language used in the instruments of transaction (*Sager, Remer, Olinger, Johnson, Barker, Crowell* and *Gowans*), the absence of a reversion or right to reacquire the deposit or any interest therein (*Remer, Olinger*), the absence of an obligation to extract minerals (*Remer, Pickard,* and *White*), the basis for determining the amount of "royalty" *(Linehan),* and the receipt of other consideration wholly unrelated to the withdrawal of minerals (*Gowans*).

B. All of the Indicia of Sale Are Present in This Case

It was the intent of taxpayer to make an absolute and outright sale of his leasehold estate under the December lease to Rodeffer as a part of the sale of his entire sand and gravel business operation, and it was the intent of Rodeffer to buy said leasehold estate [RT 183, lines 23-25; 184, lines 1-11; 130, lines 8-23; 135, lines 12-25; 136, lines 1-5; Exs. 4 and 5]. Most significantly, the "royalty" provision was intended by the parties as a method of payment for the taxpayer's leasehold estate on a deferred basis, and in lieu of a lump sum cash payment. [RT 141, lines 4-25; 142, lines 1-18]. It was the dominant purpose of the various instruments executed by the parties to carry out such sale and purchase; and the essential character of

the transaction was that of a sale and purchase of taxpayer's entire sand and gravel business operation including his leasehold estate created by the December lease. The surrender and cancellation of the December lease, execution of the June lease, assignment thereof, and the opening and closing of the bulk sale escrow, taken together, constituted merely the formal steps by which the sale and purchase transaction was accomplished, and were nothing more than component parts of a unified transaction [RT 133, lines 15-25; 134-135; 160, lines 4-25; 161, line 1].

Under a similar set of facts, the Tax Court in *Samuel D. Miller* (1967), 48 T.C.—, No. 62, determined that the cancellation of a sublease and the assignment of a prime lease by means of separate documents, were merely formal steps towards the attainment of the parties' business objective, and thus held the government to be wide of the mark in maintaining that the tax consequences of the transaction should depend upon its form rather than its substance. The issue in that case was whether an amount of money received by the taxpayer should be treated as long term capital gain from the sale of a leasehold, and the Court was faced with a situation where the formal mechanics of the transaction did not favor the taxpayer. Nevertheless, the Tax Court held for the taxpayer, stating:

> "We place little importance on the fact that the sublease cancellation and the prime lease assignment were effected by separate documents with the $32,000 payment termed consideration for the sublease cancellation. Both of the documents were executed on the same day and we view them as unified components of the same transaction. We are concerned with the substance not the form. The sublease cancellation was merely supplementary to the attainment of Seaway's business objective.
>
> * * *
>
> "We view the separate documents involved as constituting a unified transaction, and thus the payment constituted compensation for Seaway's acquisition of

petitioner's leasehold interest in the property. This interest was the only interest that petitioner had in the property and all that was important to the parties." [CCH Tax Court Reporter, at 2643-2644]

Since it was the intent of the taxpayer and Rodeffer to engage in a sale and purchase transaction, since the dominant purpose of the various documents was to carry out such transaction, since the taxpayer retained no reversionary interest or right to reacquire the lease, since taxpayer received, in addition to the "royalty", other consideration wholly unrelated to the extraction of sand and gravel, namely, the sum of Sixty Thousand Dollars ($60,000.00) in cash, and since Rodeffer never has been and is not now obligated to produce any sand, gravel or other earthy substances whatsoever from said leasehold estate, the transaction must be viewed as a sale and it must be held that the taxpayer retained no economic interest in the sand and gravel deposit.

C. Taxpayer Had a Holding Period of More Than Six Months for the Leasehold Interest Which He Sold

Since the taxpayer sold his interest in the deposit and, therefore did not retain an economic interest therein, he is entitled to treat the three cents (3¢) per ton royalty as long term capital gain under either Section 1221 or Section 1231 of the Internal Revenue Code, provided he had a holding period of more than six months for the leasehold interest which he sold.

It is undisputed that taxpayer's leasehold estate under the December lease was either a capital asset as defined in Section 1221, or property used in his trade or business as defined in Section 1231(b)(1). It is likewise clear from the amended findings of the District Court that the taxpayer held his leasehold estate under the December lease for more than six months. [Amended Findings of Fact Nos. 16 and 20, CT 133, 134] Thus, the "royalty" qualifies for long term capital gain treatment unless it can be said that it was not taxpayer's interest under the December lease which was sold to Rodeffer.

The government argued in the District Court that it was taxpayer's interest as a co-lessee under the June lease, not taxpayer's interest under the December lease, which was sold to Rodeffer and for which Rodeffer agreed to pay the "royalty". Thus, goes the argument, since it is clear that taxpayer's holding period for his interest as a co-lessee under the June lease was less than six (6) months, the "royalty" cannot under any circumstances qualify for long term capital gain treatment.

The taxpayer requested, but was denied, a special finding designed to make clear precisely which leasehold interest it was that the taxpayer sold and that Rodeffer purchased and for which Rodeffer agreed to pay the "royalty". It was error for the District Court to deny taxpayer's request, for the record is clear that the only interest in the deposit which the taxpayer owned and could therefore sell at the date of the May 27, 1955 Agreement was his leasehold interest under the December lease. It was this interest alone which Rodeffer wished to buy since it was the "key" to the entire deposit. Therefore, it was taxpayer's interest under the December lease which was sold, and the "royalties" constitute the consideration for taxpayer's interest under that lease for which he had a holding period of more than six months.

Rodeffer's testimony was positive and clear that it was taxpayer's rights under the December lease which he wanted to buy, and he didn't care whether he obtained those rights directly, by means of an assignment of the December lease, or indirectly, through the surrender by taxpayer of that lease to Irvine, followed immediately by the creation of the June lease, and consequent assignment thereof [RT 134, lines 22-25; 135; 160, lines 4-18]. Rodeffer testified that if a person had a lease to Area "A" (referring to Exhibit J which showed Area "A" to be that covered by the December lease), he could get any additional acreage that he needed.

> "My understanding was that if you held Area A you would get any additional land as time went on from Irvine. That was the key part of the deposit.

> "Without A you got nothing else. With A you got it all." [RT 153, lines 22-25; 154, line 1]

Again in response to the question whether he would have been willing to purchase Area "A" without the availability of the additional area covered by the June lease, Rodeffer testified:

> "Yes, we would have. As it turned out it wasn't necessary, but we would have been willing to." [RT 154, lines 16-17]

Irvine, however, chose not to permit a simple assignment of the December lease, followed by an amendment to include the additional acreage which Rodeffer wanted. No reasons were given. Rodeffer testified that Mr. Spurgeon of The Irvine Company simply dictated the manner in which the transaction was to be carried out, and that was that [RT 160, lines 10-25; 161, line 1]. Since the form of the transaction didn't make any difference to the taxpayer or Rodeffer so long as their business objective could be achieved, they were pleased to comply [RT 135, lines 8-11].

In the District Court the government made much of the fact that the December lease was not actually assigned to Rodeffer; rather, it was surrendered and canceled. This Court has held, however, and it is settled, that amounts received by a lessee from a third party as consideration for the lessee surrendering his lease to the lessor for cancellation, will be considered as amounts received from the sale of such lease. Therefore, if the lease is a capital asset in the hands of the lessee, or an asset used in his trade or business, and has been held by the lessee for more than six months, the lessee will have a long term capital gain.

> *Metropolitan Bldg. Co.* v. *Commissioner* (9th Cir. 1960) 282 F.2d 592

See also,

> *Commissioner* v. *Ferrer* (2nd Cir. 1962) 304 F.2d 125, 130-133
>
> *Samuel D. Miller*, supra, 48 T.C.—, No. 62

In *Metropolitan* the question presented involved the owner of real property, his lessee, and a sublessee. The sublessee wished to enter into a desirable arrangement directly with the owner and to this end to eliminate the intervening interest of the lessee-sublessor. He paid a sum of money to the lessee, in consideration of which the lessee surrendered his lease to the owner, his lessor. The court was called upon to decide whether, despite its form, the transaction should be regarded as a sale by the lessee of of his lease to the sublessee, and the sum so paid to him therefore treated as long term capital gain. In holding for the taxpayer, the court disregarded entirely the formal distinction between an assignment of a lease to a third party, and the surrender of a lease for cancellation in consideration of an amount paid by the third party, stating as follows:

> "In the case before us, the sums paid to Metropolitan . . . were paid for the purchase of Metropolitan's entire leasehold interest. * * * The giving up of a lease by a tenant fits the legal requirements of a sale or exchange under [the Internal Revenue Code] and a gain realized by the tenant on such a transaction is capital gain." [282 F.2d at 594]

CONCLUSION

It is evident from the foregoing that the taxpayer herein sold his leasehold interest under the December lease to Rodeffer, that his interest under the lease constituted an asset used in his trade or business held for more than six months, and that therefore the amounts paid to taxpayer by Rodeffer during the years in issue should be treated as gain from the sale of a capital asset held for more than six months. It is respectfully submitted, therefore, that the judgment of the District Court be reversed, and the cause remanded with instruction to enter a judgment in favor of the Appellants.

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December 8, 1967

APPENDIX

STATUTES AND REGULATIONS INVOLVED

1. Section 1221 of the Internal Revenue Code of 1954 provides in pertinent part:

"For purposes of this subtitle, the term 'capital asset' means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

"(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

"(2) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or real property used in his trade or business. . . ."

2. Section 1222 of the Internal Revenue Code of 1954 provides in pertinent part:

"For purposes of this subtitle—

* * *

"(3) LONG-TERM CAPITAL GAIN.—The term 'long-term capital gain' means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income."

3. Section 1231 of the Internal Revenue Code of 1954 provides in pertinent part:

"(a) GENERAL RULE.—If, during the taxable year, the recognized gains on sales or exchanges of property used in the trade or business . . . exceed the recognized losses from such sales [and] exchanges, such gains and

losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months.

* * *

"(b) DEFINITION OF PROPERTY USED IN THE TRADE OR BUSINESS.—For purposes of this section—

"(1) GENERAL RULE.—The term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in Section 167, held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not—

"(A) property of a kind which would properly be includable in the inventory of the taxpayer if on hand at the close of the taxable year,

"(B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, . . ."

4. Treasury Department Regulation Section 1.611-1(b)(1) provides in pertinent part:

"An economic interest is possessed in every case in which the taxpayer has acquired by investment any interest in mineral in place . . . and secures, by any form of legal relationship, income derived from the extraction of the mineral . . . to which he must look for a return of his capital. But a person who has no capital investment in the mineral deposit . . . does not possess an economic interest merely because through a contractual relation he possesses a mere economic or pecuniary advantage derived from production."

TABLE OF EXHIBITS

Plaintiffs' Exhibits	For Identification*	In Evidence*
1	21	28
2	28	30
3	45	47
4	48	51
5	57	58
6	131	133
7	136	137
8	138	139
9	182	183
10	198	205
11	205	207

Defendant's Exhibits	For Identification*	In Evidence*
A	66	66
B	87	
C		87
D	88	88
E	88	89
F		92
G		103
H	105	106
I	147	149
J	149	149
K	168	171
L	212	
M	240	241
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*Page references are to the Reporter's Transcript of Proceedings.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL FREDERIC MARX, *Attorney*

No. 22,070

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED W. ALKIRE AND LOIS O. ALKIRE,

Appellants

v.

ROBERT A. RIDDELL,

Appellee

ON APPEAL FROM
THE JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

OPINION BELOW

The Amended Findings of Fact and Conclusions of Law of the District Court for the Central District of California (I-R. 129-136) are not officially reported.

JURISDICTION

This appeal involves federal income taxes for the calendar years 1959, 1960, 1961, and 1962. The taxes in dispute were paid on June 16, 1964. (I-R. 131.) Claims for refund were timely filed on August 18, 1964, and on January 15, 1965, the taxpayers filed with the District Director a waiver of statutory notice of disallowance of the claims. (I-R. 131.) Within the time provided in

Section 6532 of the Internal Revenue Code of 1954, on June 21, 1965, the taxpayers brought this action in the District Court for recovery of the taxes paid. (I-R. 2-4.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. The judgment of the District Court was entered on March 20, 1967. (I-R. 93.) On March 28, 1967, a motion for amendment of findings, for additional findings and for special findings was filed. (I-R. 100-101.) This motion was denied in an order filed April 18, 1967. (I-R. 137-138.) Taxpayers' notice of appeal was filed on June 14, 1967. (I-R. 139.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the District Court correctly ruled that the royalty payments received by the taxpayer, [1] based on quantities of sand, gravel, and allied materials extracted, were ordinary income subject to the depletion allowance, not capital gain from a sale as taxpayer contends.

2. Whether, if the payments were capital proceeds, they were taxable as short-term or long-term capital gain.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) General Definition.--Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

1/ Taxpayer Fred W. Alkire is referred to herein as "the taxpayer" since Lois O. Alkire, his wife, is a party to this action solely by reason of the joint returns filed.

* * * *

(6) Royalties;

* * * *

(26 U.S.C. 1964 ed., Sec. 61.)

SEC. 611. ALLOWANCE OF DEDUCTION FOR DEPLETION.

(a) General Rule.--In the case of mines, oil and gas wells, other natural deposits, * * * there shall be allowed as a deduction in computing taxable income a reasonable allowance for depletion * * *, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under regulations prescribed by the Secretary or his delegate. * * *

* * * *

(26 U.S.C. 1964 ed., Sec. 611.)

SEC. 613. PERCENTAGE DEPLETION.

(a) General Rule.--In the case of mines, wells, and other natural deposits listed in subsection (b), the allowance for depletion under section 611 shall be the percentage, specified in subsection (b), of the gross income from the property * * *. * * *

(b) Percentage Depletion Rates.-- The mines, wells, and other natural deposits, and the percentages, referred to in subsection (a) are as follows:

* * * *

(5) 5 percent--

(A) * * * gravel * * * and stone * * *; * * *

* * * *

(26 U.S.C. 1964 ed., Sec. 613.)

SEC. 1222. OTHER TERMS RELATING TO CAPITAL GAINS AND LOSSES.

For purposes of this subtitle--

(1) Short-term capital gain.--The term "short-term capital gain" means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken

into account in computing gross income.

* * * *

(26 U.S.C. 1964 ed., Sec. 1222.)

Treasury Regulations on Income Tax (1954 Code):

§ 1.611-1 Allowance of deduction for depletion.

* * * *

(b) Economic interest. (1) Annual depletion deductions are allowed only to the owner of an economic interest in mineral deposits or standing timber. An economic interest is possessed in every case in which the taxpayer has acquired by investment any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the extraction of the mineral or severance of the timber, to which he must look for a return of his capital. * * *

* * * *

(26 C.F.R., Sec. 1.611-1.)

STATEMENT

The material facts, as found by the District Court (I-R. 130-135), may be summarized as follows:

On December 7, 1954, taxpayer as lessee and the Irvine Company as lessor executed a lease giving taxpayer the exclusive right to extract, process, and remove from the leased premises sand, gravel, and allied materials suitable for highway construction during the period beginning December 15, 1954, and ending December 14, 1969. Taxpayer took possession of the leased premises on December 7, 1954, and began operations on December 15, 1954. (I-R. 133.)

On June 17, 1955, the lease of December 7, 1954, was

canceled and a new lease, dated June 1, 1955, was executed by the Irvine Company as lessor and the taxpayer and E. O. Rodeffer as co-lessees. The new lease conferred the same rights as the old, for the period beginning June 1, 1955, and ending May 31, 1970. (I-R. 133-134.) Neither lease obligated the lessees to extract materials from the leased premises. (I-R. 135.)

On July 9, 1955, taxpayer and Rodeffer executed an "Assignment", dated June 1, 1955, assigning their leasehold interests to Star Rock Products, a corporation wholly owned by Rodeffer which extracted, processed, and sold rock, sand, and gravel. Star Rock Products accepted the assignment by an "Acceptance" dated June 1, 1955, and executed by the corporation's authorized officers on July 11, 1955. The Irvine Company consented to the assignment in a "Consent" dated June 1, 1955, and executed by Irvine's authorized officers on or about July 11, 1955. Star Rock Products took possession of the leasehold premises on or after July 1, 1955. (I-R. 134.)

Taxpayer retained his leasehold interest under the lease of June 1, 1955, for a period of less than six months. (I-R. 134.)

Under Provision 7(a) of an agreement between taxpayer and Rodeffer, dated May 27, 1955, it was required that (I-R. 132):

> Fred Alkire shall receive and Star Rock Products shall pay to him a royalty of 3¢ per ton on each and every ton of material produced from said leasehold and sold by Star Rock Products, or its successor, hereafter. Said royalty shall be paid monthly on the 15th day of each and every month during the term of this agreement.

Provision 8 declared that (I-R. 132-133):

> This agreement shall remain in full force and effect so long as operations are conducted upon the leasehold and rock is

produced therefrom by Star Rock Products, its successor or successors.

On September 1, 1960, Star Rock Products and eight other corporations, also wholly owned by Rodeffer, were merged in Rodeffer Industries, Inc., which continued to extract, process, and sell rock, sand, and gravel. (I-R. 131.) For the calendar years 1959, 1960, 1961, and 1962, Star Rock Products and its successor, Rodeffer Industries, Inc., paid to taxpayer, pursuant to Provision 7(a) of the agreement of May 27, 1955, between taxpayer and Rodeffer, the following amounts (I-R. 132):

1959	$ 29,151.58
1960	37,277.16
1961	34,867.60
1962	30,755.19
	$132,051.53

These payments were based solely upon the quantities of materials extracted, produced, and sold by Star Rock Products and Rodeffer Industries, Inc., from the leased premises covered by the lease dated June 1, 1955. (I-R. 135.)

In their joint returns taxpayers reported the payments as long-term capital gain. (I-R. 132.) The District Director determined that the payments were ordinary income, subject to the depletion allowance, and assessed deficiencies and interest accordingly. (I-R. 130-131.) After taxpayers paid the assessments and filed timely claims for refund, this litigation followed. (I-R. 131.)

SUMMARY OF ARGUMENT

Taxpayer transferred to an operating company his right to exploit deposits of sand, gravel and allied materials, in consideration of royalties based on quantities of materials produced. The operating company was not obligated to mine or pay for any particular amount of materials, but only to pay three cents per ton, when and as extracted, produced and sold. The District Court was clearly correct in ruling that the payments were depletable ordinary income to taxpayer, not capital gain from a sale as taxpayer contends.

In its decisions evolving the "economic interest" concept, the Supreme Court established the rule that the owner of a depletable capital interest in minerals in place retains that interest so long as he continues to look solely to income derived from extraction for a return of his capital, and that his continuing share of production income is depletable ordinary income -- not capital gain from a sale. It is clear from the Court's decisions that the rule applies without regard to the kind of mineral or the form of royalty involved.

Five Courts of Appeals have applied that rule to the type of transaction here involved. Their decisions squarely support the decision of the District Court in the instant case.

We submit that the instant decision is correct and should be affirmed.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY RULED THAT THE ROYALTY PAYMENTS RECEIVED BY TAXPAYER WERE ORDINARY INCOME SUBJECT TO THE DEPLETION ALLOWANCE.

A. Introduction

The major issue in this case is whether the per ton royalty payments received by taxpayer were the capital proceeds of a sale, as taxpayer contends, or ordinary income subject to the depletion allowance, as the District Court held.

The form of the transaction involved is undisputed. Taxpayer and Rodeffer, as co-lessees, had the right to mine the Irvine Company's deposits of sand, gravel and allied materials for a 15-year period. The co-lessees were not obligated to remove any particular amount of materials. They transferred their operating rights to Star Rock Products. The sole consideration to taxpayer for this transfer was a royalty of three cents per ton of materials extracted, produced and sold.

Taxpayer contends (Br. 8 et seq.) that this was a capital transaction under criteria which are specifically applicable to hard minerals -- criteria which differ from those governing oil and gas transactions. But the asserted dichotomy in criteria is refuted by relevant decisions of the Supreme Court, as recognized in recent decisions of five Courts of Appeals. Under those cases, a transfer of mineral operating rights in consideration of payments dependent upon production is not a sale but a leasing or licensing arrangement

which yields depletable ordinary income -- whatever the kind of mineral and the form of royalty involved.

B. The controlling principles

Section 611(a) of the Internal Revenue Code of 1954, supra, allows as a deduction in computing taxable income, in the case of mines and other natural deposits, "a reasonable allowance for depletion * * * according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under regulations prescribed by the Secretary or his delegate". In the case of sand and gravel and allied materials, a percentage depletion deduction in the amount of five per cent of the gross income from the property was authorized by the statutory provision (Section 613(b)(5)(A), supra), applicable to the taxable years involved.

The depletion allowance "is based on the theory that the extraction of minerals gradually exhausts the capital investment in the mineral deposit", and "is designed to permit a recoupment of the owner's capital investment in the minerals so that when the minerals are exhausted, the owner's capital is unimpaired". Commissioner v. Southwest Expl. Co., 350 U.S. 308, 312. Accord, Anderson v. Helvering, 310 U.S. 404, 407-408; Parsons v. Smith, 359 U.S. 215, 220; United States v. Cannelton Sewer Pipe Co., 364 U.S. 76, 81; Paragon Coal Co. v. Commissioner, 380 U.S. 624, 626.

So long as the owner of a capital interest in minerals in place retains such interest, the depletion deduction is the only permissible way in which he may be compensated for the disposition,

through production, of his capital asset. He is not entitled to capital gain treatment of production income, whether he operates the property himself or, as lessor, receives a share of the production income in the form of royalties. This was settled at an early date in Burnet v. Harmel, 287 U.S. 103. There the Supreme Court considered the contention of a lessor of an oil and gas property that a lease bonus and royalties received under the lease were taxable as capital gain. Rejecting the contention, the Court held that taxing the bonus and royalties as ordinary income did not produce the hardship at which the capital gains provisions were directed, i.e., the realization and taxation in one year of a total appreciation in value which had taken place over a considerable period of time. The Court regarded it as immaterial for federal tax purposes that the lease, under local law, effected a transfer of title.

A month after Burnet v. Harmel was decided, the Supreme Court took the same view as to hard minerals in Bankers Coal Co. v. Burnet, 287 U.S. 308. There the taxpayer-lessor had transferred operating rights in coal deposits in consideration of a per ton royalty with an annual minimum royalty guaranteed. The taxpayer contended that the royalties were capital gain from a sale. The Court again rejected this view of royalties paid under a mineral lease and, relying upon Burnet v. Harmel, supra, said (287 U.S. at p. 311):

> The considerations which led to the conclusion that the bonus and royalties paid to the lessor of Texas oil lands are taxable income and not a conversion of capital, as upon a sale of capital assets, are equally applicable to West Virginia coal leases,

> whether the title to the coal in place passes to the lessee at the date of the lease, or only upon severance by the lessee.

Shortly after deciding Bankers Coal Co., the Supreme Court enunciated the "economic interest" concept for the first time in Palmer v. Bender, 287 U.S. 551. This concept, fully consonant with the earlier decisions, embodied specific tests for determining whether, in a mineral transaction, a taxpayer has acquired or retained a depletable interest in minerals in place. The Court defined an "economic interest" (287 U.S. at p. 557) in terms of two requirements which are set forth in the current Treasury Regulations on Income Tax (1954 Code), Section 1.611-1(b)(1), supra, as follows:

> An economic interest is possessed in every case in which the taxpayer has acquired by investment any interest in mineral in place * * * and secures, by any form of legal relationship, income derived from the extraction of the mineral * * *, to which he must look for a return of his capital.

Under these requirements it may be noted, first, that a taxpayer need not have fee title to a mineral property in order to have a depletable economic interest; it suffices if he has acquired by investment any interest in mineral in place. Secondly, it is immaterial whether the taxpayer has or retains the operating rights. Hence, a transfer of operating rights, without more, does not divest a taxpayer of his depletable economic interest. He retains that interest if he continues to "look solely to the extraction" of the mineral for a return of his capital. Commissioner v. Southwest Expl. Co., supra, p. 314.

In Palmer v. Bender the taxpayers, who owned oil and gas leasehold interests, transferred the operating rights for bonuses, royalties and production payments. The Court held, as it had in Burnet v. Harmel and Bankers Coal Co., that the considerations for the transfer were depletable ordinary income, not capital gain from a sale as the taxpayers contended.

Transactions which do and do not constitute sales have been contrasted by the Supreme Court in Burton-Sutton Oil Co. v. Commissioner, 328 U.S. 25, 35-36, as follows:

> * * * there must be a determination under federal tax law as to "whether the transferor has made an absolute sale or has retained" such economic interest as we have just described in the preceding paragraph. * * * We have said that the instrument should be construed as a sale when a large cash payment was made with a reserved payment that could be satisfied by future sales of the transferred property without extraction of the oil. Obviously, there could be no depletion without extraction. Anderson v. Helvering, 310 U.S. 404, 412. On the other hand, we have construed an assignment of oil leases for cash and a deferred payment, "payable out of oil only, if, as and when produced," as the reservation of an economic interest * * * -- not a sale. Thomas v. Perkins, 301 U.S. 655.

Over the years, the Supreme Court has recognized that the requisite continuing dependence on extraction may take a variety of forms. Thus, it has recognized that an economic interest is retained where the payments are in cash rather than in kind, Helvering v. Twin Bell Syndicate, 293 U.S. 312; or constitute a percentage of gross production, Burnet v. Harmel, supra; or a percentage of the net profits, Burton-Sutton Oil Co. v. Commissioner, supra. And payment is deemed no less dependent upon extraction because

the transferor receives an initial lump sum payment (or "bonus") in addition to the right to future royalties. Burnet v. Harmel, supra; Thomas v. Perkins, 301 U.S. 655.

Similarly, royalties in a fixed amount per unit of minerals removed are depletable ordinary income, not capital gain, to a transferor of operating rights. Bankers Coal Co. v. Burnet, supra. Twelve years after that decision, in Douglas v. Commissioner, 322 U.S. 275, the Supreme Court again dealt with a transfer of operating rights in hard minerals in consideration of a fixed royalty per ton with an annual minimum payment guaranteed. While the precise issue was the validity of Treasury Regulations requiring restoration of depletion deductions to basis in the absence of production, the Court recognized that the royalty payments clearly were depletable ordinary income to the transferor in the first instance.

In accord with the Supreme Court's decisions, five Courts of Appeals have recently held in cases involving hard minerals (usually sand and gravel) that royalties in a fixed amount per unit of minerals removed were not capital gain from a sale but depletable ordinary income to the taxpayers, who had transferred the operating rights in consideration of such royalties. Royalton Stone Corp. v. Commissioner, 379 F.2d 298 (C.A. 2d), certiorari denied December 4, 1967 (36 U.S. Law Week 3227); Wood v. United States, 377 F.2d 300 (C.A. 5th), certiorari denied December 4, 1967 (36 U.S. Law Week 3227); United States v. Peeler, 377 F.2d 531 (C.A. 5th), certiorari denied December 4, 1967 (36 U.S. Law Week 3227); United States v. Green, 377 F.2d 550 (C.A. 5th), certiorari denied

December 4, 1967 (36 U.S. Law Week 3227); Schreiber v. United States (C.A. 7th), decided July 17, 1960 (20 A.F.T.R. 2d 5126); Freund v. United States, 367 F.2d 776 (C.A. 7th); Rabiner v. Bacon, 373 F.2d 537 (C.A. 8th); Laudenslager v. Commissioner, 305 F.2d 686 (C.A. 3d), certiorari denied, 371 U.S. 947.

There is one appellate decision, Linehan v. Commissioner, 297 F.2d 276 (C.A. 1st), which cannot be squared with the above-cited Supreme Court and appellate decisions. In Linehan the court held that a transfer of operating rights in hard minerals for royalty payments measured by quantity was a sale, reasoning that (p. 279) --

> the taxpayer had no "economic interest" in the material taken from his property after the severance, for in every instance he sold sand and gravel for fixed prices per cubic yard without reference to the prices received or the profits, if any, made by the exploiters.

This rationale is in direct conflict with the Supreme Court's decision in Bankers Coal Co. v. Burnet, supra. It has not been adopted by any other appellate court. To the contrary, it has been rejected by the Fifth Circuit in Wood, the Third Circuit in Laudenslager and the Eighth Circuit in Rabiner. And the Second Circuit ignored it in Royalton Stone, albeit the taxpayers in that case expressly relied upon Linehan.

The First Circuit's view that a taxpayer transfers his depletable interest in a capital transaction unless he retains his interest in the minerals "after severance", and shares in the proceeds or profits from the sale of the minerals, is clearly at odds with the Supreme Court's formulation and application of the

"economic interest" concept. The test is whether the transferor has retained an "economic interest" in minerals in place. Palmer v. Bender, supra. And there is no requirement that the transferor share in the proceeds or profits from mineral sales; it is enough if the transferor "secures, by any form of legal relationship, income derived from the extraction of the mineral * * *, to which he must look for a return of his capital". (Emphasis supplied.) Treasury Regulations, Section 1.611-1(b)(1), supra; Palmer v. Bender, supra, p. 557. As the Supreme Court reiterated in the more recent decision in Commissioner v. Southwest Expl. Co., supra, p. 314: "The second factor has been interpreted to mean that the taxpayer must look solely to the extraction of oil or gas for a return of his capital, * * *."

The First Circuit invoked Kirby Petroleum Co. v. Commissioner, 326 U.S. 599, but that case did not purport to modify or extend the "economic interest" concept. The transferor in Kirby Petroleum did indeed share in the profits of the transferee, through a retained net profits interest; and the Court held that a transferor retains his "economic interest" through retention of a net profits interest as well as through reservation of other forms of royalties. But the Court did not hold that the transferor must share in post-severance profits. Rather, the Court held (326 U.S. at p. 603):

> The test of the right to depletion is whether the taxpayer has a capital investment in the oil in place which is necessarily reduced as the oil is extracted. See Anderson v. Helvering, 310 U.S. 404, 407. [Emphasis supplied.]

Linehan was an unusual case on its facts. It involved an

agreement to excavate a tract of raised elevation down to a specified grade, in preparation for industrial use of the property as so graded, and there is some indication that the First Circuit viewed the transaction as the completed sale of a specific total quantity of minerals. In any event, the rationale of the case is simply wrong.

C. Taxpayer retained his "economic interest" in the minerals in place and received the royalty payments as depletable ordinary income, not capital gain

The Supreme Court's "economic interest" concept, as the very term indicates, relates to the substance of a transaction and not the legal forms employed. Burton-Sutton Oil Co. v. Commissioner, supra, p. 32. The substantive test is simple and unqualified. If a taxpayer transfers operating rights solely in consideration of payments geared to extraction and dependent upon extraction, he has retained his "economic interest" and receives the payments as depletable ordinary income.

Five Courts of Appeals have specifically applied this rule where operating rights in hard minerals were transferred solely in consideration of payments per unit, when and as extracted and removed. They have expressly recognized that the Supreme Court's "economic interest" concept is fully applicable to such situations. And their decisions are squarely supported by the Supreme Court's ruling in Bankers Coal Co. v. Burnet, supra. Accordingly, the District Court correctly ruled in the instant case that taxpayer retained his "economic interest" and received the per ton royalties as depletable ordinary income.

Taxpayer invokes (Br. 13-19) appellate decisions in six Circuits, including the Ninth, but -- apart from Linehan, discussed

above -- the cases cited do not support him.

It is not quite clear why taxpayer cites this Court's decision in Gowans v. Commissioner, 246 F. 2d 448, since he acknowledges (Br. 16) that that case involved "a somewhat unique set of facts" and that this Court emphasized exclusive dependence on production income as the test of a continuing "economic interest". In fact, Gowans is wholly inapposite. There the transferee of operating rights had both the right and the obligation to remove a specific total quantity of sand from a designated deposit, during a fixed period, in consideration of a fixed total price, payable in any event. While the total purchase price was prorated over the period of extraction in payments measured by quantity, it was independent of extraction not only in the operating company's ultimate obligation to pay the whole amount but in the securing of this obligation by the company's bank note for the total sum. On these facts, this Court held that the parties effected a capital transaction, i. e., the outright sale of a specific asset for a fixed price.

In the case at bar, by contrast, Star Rock Products was not obligated to remove or pay for any particular amount of materials, but only to pay three cents per ton extracted. On similar facts, the Second Circuit held in Royalton Stone Corp. v. Commissioner, supra, that the transaction was a mere licensing arrangement, emphasizing inter alia that (379 F. 2d at p. 300) --

> No fixed purchase price was paid or payable at any time. If there was no quarrying the taxpayers would receive nothing. The only obligation of the corporations was to pay 20 cents a ton for whatever amount they removed.

Taxpayer cites (Br. 11-12) Barker v. Commissioner, 250 F. 2d 195 (C. A. 2d), and United States v. White, 311 F. 2d 399 (C. A. 10th), as authority for the proposition that the "economic interest" test is not applicable in sand and gravel cases. But the Second Circuit's decision in Royalton Stone, which directly supports the District Court's decision in the instant case, has restricted Barker to situations where (as in Gowans) there was an obligation to pay a fixed total price without regard to the amount of minerals extracted. Moreover, in Royalton Stone the Second Circuit recognized the applicability of the "economic interest" concept, quoting examples of its application from the Supreme Court's opinion in Burton-Sutton Oil Co.

In White the Tenth Circuit held only that a large lump sum down payment was capital gain. As to future royalties, the court said (311 F. 2d at p. 402): "We do not reach the question of whether the payments to be made from production amount to the reservation of an economic interest which would require a different tax treatment of the income from that source". If anything, this indicates a recognition that the "economic interest" concept would control the reserved question as to whether the royalties would be depletable ordinary income or capital gain.

Taxpayer's reliance (Br. 14) on Crowell Land & Min. Corp. v. Commissioner, 242 F. 2d 864 (C. A. 5th), is similarly misplaced. The law of the Fifth Circuit today is Wood v. United States, supra, which squarely supports the instant decision, as noted above. And taxpayer errs in contending (Br. 14-15) that Wood approved the

emphasis in Crowell upon the wording of the governing instrument as one of sale. To the contrary, in comparing Crowell with Albritton v. Commissioner, 248 F. 2d 49, the court said in Wood (377 F. 2d at p. 311, fn. 26) that "if the two cases were decided differently solely because of the wording of the agreements, we do not view such distinction as properly determinative of tax consequences under the economic interest test". Wood also disapproved of Crowell to the extent that it based capital gains treatment on the fact that the royalties involved were fixed payments per ton of minerals removed.

Finally, taxpayer cites (Br. 15-16) the Eighth Circuit's decision in Commissioner v. Remer, 260 F. 2d 337 -- but acknowledges (Br. 16) that Remer has been limited to its facts by the same court in Rabiner v. Bacon, supra. Rabiner squarely supports the instant decision in reasoning and result.

In sum, the Second, Third, Fifth, Seventh and Eighth Circuits are now united in holding that a transfer of operating rights in hard minerals, in consideration of payments per unit, when and as extracted, is not a sale; that the transferor retains his "economic interest" and receives the per unit payments as depletable ordinary income. This conclusion is in accord with the relevant decisions of the Supreme Court.

Without more, we submit that the decision in the instant case is correct and should be affirmed.

II

IF THE ROYALTY PAYMENTS WERE THE PROCEEDS OF A CAPITAL TRANSACTION, THEY ARE TAXABLE AS SHORT-TERM CAPITAL GAIN

Section 1222 of the 1954 Code, supra, defines a short-term capital gain as a "gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing gross income". The "Assignment" to Star Rock Products of the interests of taxpayer and Rodeffer, as co-lessees, was executed on July 9, 1955. (I-R. 134.) The co-lessees' interests were created by the lease dated June 1, 1955, executed on June 17, 1955. (I-R. 133.) Assuming arguendo that the assignment effected a sale of taxpayer's interest, it is obvious that he had not held it for six months; hence the gain from the sale was short-term capital gain.

Taxpayer attempts to escape this conclusion by arguing (Br. 20-22) that the lease of June 1, 1955, merely continued his interest under the lease of December 7, 1954, and that the execution of the new lease should be disregarded for the purpose of determining his holding period. But his interest under the second lease was not the same as under the first. Under the first lease he had the exclusive right to exploit the minerals; he relinquished that right by voluntary cancellation and, under the new lease, shared with Rodeffer the rights to exploit the minerals. The District Court correctly ruled that (I-R. 135): "The voluntary cancellation of the lease dated December 7, 1955, constituted a complete termination

of Fred W. Alkire's leasehold interest in said lease," and that (I-R. 135-136): "The lease dated June 1, 1955, created for * * * Fred W. Alkire, a new leasehold interest which was voluntarily and lawfully assigned to Star Rock Products, Inc." 2/

CONCLUSION

For the reasons stated above, the decision of the District Court was correct and should be affirmed.

Respectfully submitted,

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2/ Metropolitan Building Co. v. Commissioner, 282 F.2d 592 (C.A. 9th, 1960), and Miller v. Commissioner, 48 T.C. 649 (1967) cited by taxpayer (Br. 22), present very different factual situations, and consequently are not relevant to the decision of the present case. In those cases the taxpayers received a lump sum as consideration for the complete termination of their interest in leasehold property. Those cases involved the nature of the lump sum payment received for the cancellation of a lease, whereas the problem in the present case is to determine what was transferred.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Arthur M. Greenwald

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No. 22070

In the

United States Court of Appeals

For the Ninth Circuit

FRED W. ALKIRE AND LOIS O. ALKIRE,
Appellants,

vs.

ROBERT A. RIDDELL,
Appellee.

On Appeal from the United States District Court for the Central District of California

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

INTRODUCTION

The taxpayer in his Opening Brief (page 11) threw down the gauntlet by declaring that *in every hard mineral case where capital gain has been denied based upon the recitation of the economic interest test, the facts have plainly disclosed the absence of a sale under accepted criteria.* The Government has not only failed to take up the challenge by disputing the proposition, but has failed to distinguish the cases cited by the taxpayer. The closest the Government has come in its brief to meeting the issue head-on has been to suggest that certain of the Circuit Court of Appeals cases

cited by the taxpayer have been restricted or limited to their facts by later decisions. As taxpayer points out in a subsequent portion of this brief (Part C, infra) the Government's suggestion in this regard is totally unfounded.

Moreover, nowhere in its brief does the Government even argue that the taxpayer retained a reversionary interest in the mineral deposit, or a right to reacquire an interest in the deposit, or a right to compel exploitation of the deposit, or any other incident of ownership or "stick in the so-called bundle of rights". [see, *White* v. *United States* (D.C. Colo. 1966) 254 F.Supp. 894, 896-897]

The Government's position in this case is summarized in its statement on page 16 of its brief that "[i]f a taxpayer transfers operating rights solely in consideration of payments geared to extraction and dependent upon extraction, he has retained his 'economic interest' and receives the payments as depletable ordinary income." The balance of the Government's brief is devoted to (i) attempting to show that the cases support the stated proposition, and (ii) attempting to show that the taxpayer in this case transferred nothing more than "operating rights" and received no consideration other than production payments.

The Government never tells us what is meant by the term "operating rights". If the term means merely the right to enter upon the property for a period of time for the purpose of extracting minerals therefrom (i.e., a typical mineral lease) then there can be no quarrel with the statement, since there would be no sale or exchange of the property within the meaning of Section 1222 of the Internal Revenue Code. If, on the other hand, the phrase "transfers operating rights" is used in a broader sense to include those transactions having all of the generally accepted characteristics of a sale, the proposition is simply not supported by the cases and, in any event, would not be applicable to this case since the taxpayer here received other consideration wholly unrelated to the extraction of minerals.

REPLY TO ARGUMENT

A. Comments on "Introduction", Appellee's Brief Pages 8 and 9

In its effort to reshape the instant case into one which will fit into the mold established by its statement of position, the Government begins by establishing a premise which begs the question. Thus, the Government on page 8 of its brief asserts as an "undisputed" matter that the agreement to pay three cents per ton of materials extracted, produced and sold was the sole consideration to taxpayer for the transfer of taxpayer's rights under the June lease. Nothing could be further from the facts. In the first place, the record makes it clear that the "royalty" agreement was part of the consideration for the sale by taxpayer of his sand and gravel business operation, which included taxpayer's rights under the *December* lease, not the June lease. The June lease, as to taxpayer, was a mere formality; taxpayer's rights thereunder were transitory and illusory. [See Appellant's Opening Brief, Parts B and C, pages 18-23] Secondly, the record shows that the "royalty" agreement was not the *sole* consideration to taxpayer for the transfer of his sand and gravel business operation (including his rights under the December lease). In addition, the taxpayer received THREE THOUSAND DOLLARS ($3,000.00) cash for his leasehold improvements (under the December lease), and FIFTY-SEVEN THOUSAND DOLLARS ($57,000.00) cash for his machinery and equipment. [See Appellant's Opening Brief, Statement of Facts, pages 3-7]

The Government itself acknowledges the questionability of its assumed premise (that it was the taxpayer's rights under the June lease which were transferred for consideration of the "royalty") when later in its brief it concedes that there is at least some question as to which leasehold rights were transferred for consideration. [See Appellee's Brief, footnote 2, page 21]

B. Comments on "The Controlling Principles", Appellee's Brief, Pages 9-16

Having hopefully established as a premise that (i) the taxpayer transferred nothing other than his rights under the June lease, and (ii) the sole consideration for this transfer was the "royalty" agreement, the Government proceeds to cite a number of Supreme Court cases which hold that the granting of nothing more than the right to extract minerals solely for the consideration of production payments yields depletable ordinary income. The taxpayer does not dispute these holdings. Their pertinence to this case, however, depends upon the validity of the Government's premise. With the fall of the premise must also fall the relevancy of the cited decisions.

None of the cases cited by the Government deal with situations in which, under well established criteria, there was an absolute sale of the land containing a hard mineral deposit.

C. Reply to Appellee's Argument That Taxpayer Retained an "Economic Interest"

The Government states that five Courts of Appeal have held that where the taxpayer transferred "operating rights in hard minerals" solely in consideration of payments per unit, the payments are depletable ordinary income. An analysis of the facts of the cases referred to sheds light on what the Government means by "operating rights", for in every one of those cases the court specifically found that there had *not* occurred a *sale* under established criteria. In each of the cases the court determined that, aside from the right to receive production payments, the transaction lacked the essential characteristics of a sale, and constituted nothing more than a lease or a license. Such a finding is determinative of the tax treatment to be accorded the payments received, for there can never be capital gain in the absence of a sale or exchange.

The Government states that *Royalton Stone Corporation* v. *Commissioner* (2d Cir. 1967) 379 F.2d 298, involved "similar facts", and that it "directly supports" the District Court's decision in this case. In fact, the case is quite different on its facts since it did not involve a sale or anything closely resembling a sale. In this connection, the Court stated:

> "Upon close examination the incidents of the transactions into which the parties entered prove to be a licensing arrangement with provisions for royalty payments rather than a sale of the minerals. The taxpayers merely licensed the corporations to remove the minerals in return for a share of the proceeds of their sale. The only property transferred to the corporations by the agreements was the right to quarry the minerals. There was no present conveyance of anything else.
>
> "The taxpayers expressly reserved legal title until some indefinite future time and, as an appropriate incident of ownership, were obliged to pay taxes and assessments on the property. It is clear that they continued to own the minerals until they were removed truckload by truckload." [379 F.2d at 299-300]

Nowhere in the opinion did the Court purport to restrict or limit its decision in *Barker* v. *Commissioner* (2d Cir. 1957) 250 F.2d 195, as suggested by the Government; the Court merely distinguished *Barker,* along with *Crowell Land & Min. Corp.* v. *Commissioner* (5th Cir. 1957) 242 F.2d 864, and *Gowans* v. *Commissioner* (9th Cir. 1957) 246 F.2d 448, since those cases clearly involved *sales,* and *Royalton* clearly did not.

Next, the Government states that the law of the Fifth Circuit today is *Wood* v. *United States* (5th Cir. 1967) 377 F.2d 300, and that *Wood* "squarely supports the instant decision". The taxpayer does not dispute the

fact that *Wood* is good law; but *Wood* involved a "typical mineral lease" [377 F.2d at 305]. Thus, the holding of the Court was to be expected, and has no bearing on the instant case. The Government again appears to equate the distinguishing of a case on its facts with the disapproval thereof, by suggesting that the Court in *Wood* disapproved *Crowell.* The Court merely distinguished *Crowell* because *Crowell* involved a *sale,* and in so doing the Court stated the obvious—that a transaction does not become a sale rather than something else, merely because the word "sale" is used in the operative instruments. The use of words of sale is merely *one* of the indicia of a sale which, standing alone, is not determinative.

Finally, the Government suggests that the decision in *Rabiner* v. *Bacon* (8th Cir. 1967) 373 F.2d 537, limited *Commissioner* v. *Remer* (8th Cir. 1958) 260 F.2d 337, to its facts. *Rabiner* involved a "usual and simple form of mining lease" [373 F.2d at 538] and, thus, as in *Wood,* the holding was entirely predictable. Nowhere in its opinion did the Court purport to limit its decision in *Remer* to its facts; the Court merely distinguished *Remer* because *Remer* involved a *sale,* and *Rabiner* did not.

The Government also cites the Fifth Circuit's decisions in *United States* v. *Peeler* (5th Cir. 1967) 377 F.2d 531 and *United States* v. *Green* (5th Cir. 1967) 377 F.2d 550, the Seventh Circuit's decisions in *Schreiber* v. *United States* (7th Cir. 1967) 382 F.2d 553 and *Freund* v. *United States* (7th Cir. 1966) 367 F.2d 776, and the Third Circuit's decision in *Laudenslager* v. *Commissioner* (3rd Cir. 1962) 305 F.2d 686.

Peeler and *Green* were companion cases to *Wood,* and were decided by the Fifth Circuit on the same day as *Wood. Peeler* involved "a lease agreement . . . between taxpayer and Weston & Brooker whereby the latter was given the right to prospect on taxpayer's land for a period of six months. The agreement also provided that if after this period, Weston & Brooker wished to mine, the contract

could be kept in force for twenty years by the payment of a yearly minimum royalty and a specified royalty per ton of mineral removed.'' (The lease was subsequently extended for an indefinite period of time.) [377 F.2d at 531-532] *Green* involved a ''lease contract'' which was to be in effect for ten years, with an option to renew for an additional ten years. It could be terminated at any time that the lessee might decide the mineral deposits could not be profitably exploited. [377 F.2d at 550]

Schreiber involved agreements found by the Court to constitute leases.

> ''The 1957 agreement was described as a 'lease' in four important respects:
>
> 1. Reserving the owners' right to use all the land for agricultural purposes until needed for use by Merget.
>
> 2. Providing a five-year term, with the three-year renewal right.
>
> 3. Granting the owners the right to terminate upon Merget's bankruptcy or insolvency.
>
> 4. Granting the owners the right to terminate in the event of any default by Merget.
>
> ''In May 1963, taxpayers and Merget executed an identical agreement, except that in the second instrument 'agreement' was used throughout in substitution of 'lease'.'' [382 F.2d at 554]

Freund likewise involved a lease.

''* * * But the language of the agreement is couched in the terms of a lease and its provisions contain all the indicia of a lease for a definite term for the purpose of extracting sand and gravel from the premises. Moreover, there is nothing in the record, including the answers to

the interrogatories and the deposition of the taxpayer, which indicates any contrary intention of the parties." [367 F.2d 778]

Laundenslager involved "simply an arrangement whereby Brewster was granted the right to excavate and remove earth fill in return for a royalty of a specified sum per unit of material taken." [305 F.2d at 691]

None of the five Circuit Court decisions discussed above shed any new light on the question at hand. All of them merely reaffirm what has already been stated by this taxpayer—that in every hard mineral case where capital gain has been denied the facts have plainly disclosed *the absence of a sale* under generally accepted principles.

In sum, the Government's underlying position seems to be that in every case where the taxpayer retains a right to receive payments based upon the exploitation of the property transferred (i.e., a "royalty") there can be no *sale* and hence no capital gain. Not only do the authorities cited by this taxpayer in his Opening Brief show that this is not true where there has been a *sale* (under accepted principles) of mineral producing property, but this contention by the Government flies in the face of well established holdings in other contexts. For example, it is settled than an amateur inventor is entitled to capital gain treatment where he transfers his patent rights *solely* in consideration of "royalty" payments based upon the exploitation of the patented item.[1]

United States v. *Carruthers* (9th Cir. 1955) 219 F.2d 21

Kronner v. *United States* (Ct.Cls. 1953) 110 F.Supp. 730, 732-735

Commissioner v. *Hopkinson* (2d Cir. 1942) 126 F.2d 406, 409-410

1. This principle was established prior to the enactment of Section 1235 of the Internal Revenue Code. However, it is still the law in situations where, by its terms, Section 1235 is not applicable. See, Reg. Sec. 1.1235-1(b); *Leonard Coplan* (1957) 28 T.C. 1189, 1192.

The same principle applies where a trademark is sold in consideration of a "royalty" agreement.

Reid v. *Commissioner* (1956) 26 T.C. 622

Also, where a business is sold and the seller reserves the right to a share of the future earnings of the business, the transaction is treated as a capital transaction giving rise to capital gain or loss.

Vermont Transit Co. v. *Commissioner* (2d Cir. 1955) 218 F.2d 468[2]

The Government's position, therefore, is wholly untenable where, under accepted and well established criteria, there has occurred a *sale* of the mineral producing property.

D. Reply to Appellee's Argument That the "Royalties" Should Be Taxed As Short Term Capital Gain

After rightly and properly stating throughout the major portion of its brief that the substance of a transaction and not the legal forms employed is controlling (Appellee's Brief, page 16) and that the mere wording of agreements is not determinative of tax consequences (Appellee's Brief, page 19), the Government in the concluding portion of its brief surprisingly becomes completely absorbed by the form of the transaction before this Court, to the exclusion of its substance. The transaction is viewed by the Government in terms of a simplistic syllogism, thusly: The property which the taxpayer sold in consideration of the "royalty" agreement was his interest as a co-lessee under the June lease. Taxpayer had a holding period of less than six months for this interest. Therefore, the gain from the sale (i.e., the "royalties") was short term capital gain.

---

2. It is interesting to note that in the *Vermont Transit Co.* case it was the Government, not uncharacteristically switching roles, which argued that the participation in future earnings *did not* constitute the reservation in the seller of an "economic interest" for tax purposes.

The fallacy of this syllogism lies in its major premise; for the record makes it plain that it was taxpayer's interest under the *December* lease, not the June lease, which was bargained for and sold. (See, Appellant's Opening Brief, Parts B and C, pages 18-23) Moreover, in order to make this crystal clear and beyond dispute, the taxpayer requested the special finding which was denied [CT 137-138].

Contrary to the assertion of the Government, taxpayer does *not* contend that the June lease merely continued his interest under the December lease. Taxpayer, rather, contends that it was his interest under the December lease which in substance was transferred, for which interest he clearly had a holding period of more than six months; and that the execution of the June lease by taxpayer was merely a formal step, without substance as to taxpayer, by which the transfer of his interest under the December lease was accomplished. (See, Appellant's Opening Brief, Part C, pages 20-23)

The rule that the substance of a transaction, and not its form, will govern the tax consequences is so firmly entrenched that it applies equally in favor of the taxpayer as it does for the Government. Thus, it is well settled that a taxpayer can prove that his intent was different from that expressed in his own contract.[3]

Peerless Steel Equipment Company (1967)
26 T.C.M. 880

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3. The Government has now announced its acquiescence to the decision in *Samuel D. Miller* (1967) 48 T.C. 649 [cited in Appellants' Opening Brief at pages 19 and 22] I.R.B. 1968-4, 5.

CONCLUSION

For the reasons stated in Appellant's Opening Brief, and stated above, the decision of the District Court should be reversed.

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February ..., 1968

I certify that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

Paul Frederic Marx, *Attorney*

No. 22071

United States Court of Appeals

For the Ninth Circuit

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Appellant,

against

DOUGLAS D. CHURCH, doing business as
MODERN SPECIALIST,
Appellee.

BRIEF FOR APPELLANT

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ARGUMENT:

I. The court below erred in sanctioning defendant's use of plaintiff's trade name and trademark "Volkswagen" as a trade name and service mark to identify his business and his services 25

A. Only plaintiff and its licensees may employ "Volkswagen" or "VW" as a trademark, service mark or trade name 25

B. Use of a trademark, service mark or trade name to denominate or identify particular goods, services or business is reserved exclusively to the owner 27

C. The prohibition against the trademark use of another's name or mark is not affected by the addition of qualifying or explanatory language 29

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No. 22071

United States Court of Appeals

For the Ninth Circuit

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Appellant,

against

DOUGLAS D. CHURCH, doing business as MODERN SPECIALIST,
Appellee.

BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal by Volkswagenwerk Aktiengesellschaft ("VWAG") from a judgment of the United States District Court for the Southern District of California, Central Division, rendered by the Honorable C. Nils Tavares and entered April 11, 1967, dismissing without costs a complaint for trademark infringement and unfair competition (CT 175-176).*

VWAG, referred to hereinafter for convenience as plaintiff, is a corporation of the Federal Republic of Germany with its principal place of business at Wolfsburg, Germany (CT 138). It is the source of products and services identified in the United States—as they are throughout the world—by the word "Volkswagen." In this country such services are rendered by American concerns, independently

* The initials "CT" designate the "Transcript of Record" prepared by the Clerk of this Court. The initials "RT" refer to the "Reporter's Transcript of Proceedings" in the United States District Court. The abbreviation "P. Ex." signifies exhibits filed in the court below by plaintiff-appellant and "D. Ex." those introduced by defendant-appellee.

owned but operating under plaintiff's aegis. Plaintiff has registered "Volkswagen" as its trademark in the United States Patent Office (CT 139). As the court below found, the goodwill inhering in this term as a trade name, trademark and service mark belongs to plaintiff (CT 143).

Douglas D. Church, defendant-appellee, referred to hereinafter as defendant, is a citizen of the State of California (CT 138-139). Shortly after leaving high school, he went into the business of repairing Volkswagen and Porsche automobiles in Long Beach, California. Since he first opened his shop he has made generous use of plaintiff's mark "Volkswagen" to identify his business and his services. Among other things, he adopted initially as his trade name "Modern Volkswagen Porsche Service" (CT 145). Although, in response to plaintiff's protests, he technically changed this business identification, he refused to modify or alter his claim to provide "Volkswagen * * * Service," and deliberately invited plaintiff to bring the present proceeding to establish its rights.

The complaint, which was brought under both federal and local law, invokes the jurisdiction of the District Court under the Trademark Act of 1946, 60 Stat. 427 (1946), as amended, 15 U.S.C., sections 1051 *et seq.,* and under treaty; it also relies on the diversity of citizenship of the parties (CT 2). Plaintiff requests the court to enjoin defendant from using "Volkswagen" as a trade name or service mark to identify himself and his services, or in the fashion of authorized Volkswagen service facilities. It asks that he be permitted to use this term only descriptively to refer to genuine Volkswagen products (CT 2-13). An accounting is also sought, but this request has not been pressed. Defendant's answer denies generally the allegations of the complaint and, among other things, attacks the validity of "Volkswagen" as a trademark (CT 14-21).

After a seven day trial, Judge Tavares filed his decision on June 20, 1966 sustaining the validity of "Volkswagen" as a trademark, but concluding that defendant had not

infringed it (CT 83-96). Formal findings of fact and conclusions of law were filed on April 11, 1967 (CT 137-153).*

The District Court had jurisdiction over plaintiff's complaint and this Court has jurisdiction to review the judgment dismissing that complaint under the following statutory provisions and treaties:

(1) Section 39 of the Trademark Act of 1946 (popularly known as the Lanham Act), 15 U.S.C., section 1121, vests original and appellate jurisdiction in the federal courts over any action arising out of violation of its prohibitions against trademark infringement and unfair competition "without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties." The trade names, trademarks and service marks which defendant is infringing are employed in interstate and foreign commerce and are the subject of federal registrations (CT 139). Accordingly, plaintiff is entitled to invoke the remedies provided by the Lanham Act, which include injunctive relief against "[a]ny person who shall, without the consent of the registrant * * * use in commerce any reproduction * * * of a registered mark in connection with * * * any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C., sections 1114, 1116.

The same remedy is given with respect to unfair competition affecting "trade names or commercial names," whether or not they form parts of marks. 15 U.S.C., section 1126.

(2) As a national of the Federal Republic of Germany, plaintiff can claim the protection of its rights promised

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* The "Transcript of Record" includes not only the lower court's findings of fact and conclusions of law (CT 137-153) but also those proposed by defendant in June 1966 (CT 166-173) and in October 1966 (CT 154-164).

by the International Convention for the Protection o Industrial Property, signed at Paris on March 20, 188 13 U.S.T. & O.I.A. 25 (1958), as implemented by the Lanhan Act, 15 U.S.C., section 1126(b), (g) and (h).

(3) Pendent jurisdiction also exists under sectio 1338(b) of the Judicial Code, 28 U.S.C., section 1338(b).

(4) Finally, there is jurisdiction under 28 U.S.C., sec tion 1332, because of the diversity of citizenship of th parties found by the court below. Plaintiff is a Germa corporation and defendant is a citizen of California an the value of the goodwill involved is substantially in exces of $10,000 (CT 138-139, 143).

Jurisdiction over this appeal is conferred on this Cour by 28 U.S.C., section 1291, which plaintiff has invoked b timely notice of appeal filed May 8, 1967 (CT 177).

Treaty and Statutes Involved

Pertinent extracts from the treaty and statutes involve in this proceeding are reproduced in Appendix A.

Statement of the Case

In the main, the basic facts are not in dispute, althoug plaintiff challenges some of the factual and legal conclusions drawn by the court below from them. Accordingly, we refrain from restating in any detail the evidence underlying findings not in controversy.

"Volkswagen" is Plaintiff's Trade Name, Trademark and Service Mark

Rising as a phoenix from the ashes of Nazi Germany, VWAG, a postwar creation of the Federal Republic of Germany, has become the leading automobile manufacture in its own country, a world-wide exporter of automobile

products, parts and accessories and the parent of sales and service organizations blanketing large portions of the globe [P. Ex. 9E, Nelson, *Small Wonder: The Amazing Story of the Volkswagen,* 114-116, 140 (1965)].* Throughout the world, the German word "Volkswagen" has become synonymous with plaintiff, its products and its services.

In the United States plaintiff registered "Volkswagen" as its trademark in 1955 (P. Ex. 1) and five years after the trademark was accepted for registration plaintiff filed the affidavits (CT 139) which by statute make the registration both "incontestable" and "conclusive evidence of the registrant's exclusive right to use the registered marks in commerce" (15 U.S.C., sections 1065, 1115). Since 1956, to quote the findings below, the mark "Volkswagen" and plaintiff's related marks, the initials "VW" and the encircled "VW" emblem,** have been "extensively used and * * * advertised and publicized in the United States * * * as trademarks on and for Volkswagen Products and as service marks for services furnished in connection with the maintenance and repair of Volkswagen Products" (CT 139-140).

Approximately eight hundred seventy-five United States enterprises dealing directly with the public were authorized at the time of trial to use "Volkswagen" to identify their business and services (CT 140). Eighty-one of these were located in Southern California and Arizona (*ibid.*). Detailed control over the nature and quality of the services sold by these businesses is maintained through a series of interlocking franchise agreements radiating out from plaintiff's wholly owned subsidiary, Volkswagen of America, Inc. ("VWoA") (*ibid.*).

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* By stipulation of the parties in the court below (Ct. Ex. 1), any facts stated in the book *Small Wonder* may be considered as evidence of such facts in this case (RT 826-828, 845-848).

** The "encircled 'VW' emblem" consists of the letters "VW" superimposed upon one another and framed by a circle.

"Volkswagen" Identifies Authorized Volkswagen Sales and Service Facilities

Each franchised Volkswagen sales and service establishment is not only authorized, but required, to identify its premises by displaying the word "Volkswagen" and other Volkswagen trademarks (CT 141). It is encouraged to identify its facilities by stretching out across the front of its premises the word "Volkswagen" in a distinctive style of lettering (known as "Memphis Bold"), and in a blue color against a white background (P. Ex. 68c, "Official Volkswagen Name Identification"; RT 229-231, 319-320). It also will normally display on top of a pole another of plaintiff's trademarks, the encircled "VW" emblem (P. Ex. 68c, "What's White and Blue and Read all Over? * * * "; RT 319; CT 141). The word "Volkswagen" may also be displayed elsewhere on the dealer's premises, not necessarily in Memphis Bold lettering, sometimes alone and sometimes to modify "Parts" or "Service" (*e.g.,* P. Ex. 69e; D. Ex. A2; RT 469).

VWoA recommends that the premises of Volkswagen dealerships be painted white on the outside and that the signs used on them be in blue (P. Ex. 68d; RT 234-237). This is the same color scheme—blue and white—used in displaying the Volkswagen trademarks (P. Ex. 68c).

However, as the court below noted, there are a "substantial number" of older Volkswagen dealerships housed in buildings which do not conform to the Volkswagen style and which are consequently not "distinguishable by their mere physical facilities, size, style or coloring of lettering, from the establishments of unfranchised businesses dealing with the sale or repair of Volkswagens" (CT 143-144).

Many Volkswagen dealers, between 150 and 200, are also authorized to handle Porsche cars and display a "Porsche" sign or other identification in addition to plaintiff's trademarks (CT 141).

What is "Volkswagen Service"

The findings made below reflect the expense and effort that have gone into establishing and maintaining the high quality of the services sold under the "Volkswagen" service mark. Dealers licensed to do business under this mark, the court below found,

> "are especially equipped and trained * * * to sell, service and repair Volkswagen Products. For this purpose each licensee receives special tools and service literature and some of his personnel are generally given individual, specialized training. Other assistance is provided through visits, meetings, lecture material and other aids" (CT 140).

Constant surveillance is maintained to ensure that dealers are meeting their obligations regarding service (CT 140-141). To quote the court below again:

> "Each dealership is visited more or less regularly for this purpose by representatives of VWoA and of the local distributor and reports are filed regarding facilities, personnel, organization, quality control, distribution of work, customer relations (which includes such matters as what records the dealer maintained and what arrangements he made to accommodate the customer) and performance. Specific recommendations and suggestions are made to the dealer on the basis of these reports" (CT 141).

The parts used by authorized service facilities are also controlled. No part not sold or approved by plaintiff or VWoA may be used if necessary to the operation of the vehicle and inferior to a genuine Volkswagen part (CT 141-142).

The Goodwill Created for Volkswagen Products and "Volkswagen Service"

To acquaint the American public with the character of the products and services sold under the "Volkswagen" mark, over fifty-five million dollars had been spent up to

the trial for advertising and promotion (CT 142). One of the purposes of this advertising, as the court below found, is to acquaint the public with the efforts plaintiff makes to maintain a high level of service at the facilities authorized by it to render Volkswagen service (*ibid.*). For example, in December 1964, national coverage was given the picture of a Volkswagen vehicle being towed over the caption "What if it Poops Out in Paducah?" (P. Ex. 10dd, P. Ex. 10ee). Part of the text of this advertisement read "So if you want to find out how good VW service is, break down and call us." Similar advertisements appear regularly in such magazines as Life, Look, Time, New Yorker, Sunset, Saturday Evening Post and Newsweek (P. Exs. 10f-10ee, 10d, pp. 1-2; CT 142).

Special promotional material given purchasers of Volkswagen automobiles tells this selective audience of the special equipment employed by the "VW Service Shop," the quality control exercised over repair parts, the instruction and training received by the mechanics employed by authorized dealers and the thoroughness of "Volkswagen Service" (CT 142).

On promotional and other material issued by plaintiff or by VWoA and in advertising done by the latter, the trademark "Volkswagen" or its trademarked abbreviation "VW" identifies services performed by the authorized domestic Volkswagen organization and such services are referred to simply as "Volkswagen Service" or "VW Service." The court below so found, noting, however, that there is no proof that the recommended format is always followed (CT 142).

The success which the products and services sold under the Volkswagen trademark enjoy reflects the goodwill which has been built up for both. Sales of the car have climbed steadily. In 1964, the last complete year prior to trial, approximately 330,000 cars manufactured by plaintiff were sold in this country (CT 143). Total exports to the United States by that year exceeded 1,600,000 units (*ibid.*).

The volume of services identified by the Volkswagen trademarks has kept close pace with sales figures. Thus, for example, in Southern California, Arizona and Hawaii, out of 172,541 Volkswagen vehicles in operation, 160,397, or better than ninety percent, are owned by regular customers of authorized service facilities (CT 143).

As the court below found:

> "Very substantial good-will has been built up for the term 'Volkswagen' and plaintiff's other trademarks and the value of such good-will is substantially in excess of $10,000." (*ibid.*).

Credit for the acceptance Volkswagen has received in the American market is due to the constant emphasis placed on the provision of reliable, inexpensive service [RT 95-97; P.Ex. 9e, Nelson, *Small Wonder, The Amazing Story of the Volkswagen,* 157 (1965)]. As is impressed on each member of the authorized Volkswagen organization in its franchise agreement, plaintiff's consistent and fundamental policy is to combine into an integral whole a top-flight product with inexpensive, high-quality service (*e.g.,* P. Ex. 5e, p.i., P. Ex. 6e, p. 1).

Defendant's Use of "Volkswagen" and "Volkswagen Service" To Identify His Business and His Services

Inevitably, the goodwill built up for Volkswagen products and services has attracted other persons. Airline pilots flying between this country and Europe bring in Volkswagen cars for resale which they pick up from unidentified sources (RT 446-447). European manufacturers export replacement parts for Volkswagen vehicles to jobbers (RT 624, 639-640). Mechanics, self-trained or with some experience within the Volkswagen organization, start their own garages specializing in repair of Volkswagen cars (RT 638, 1074-1075). Neither plaintiff nor anyone within the Volkswagen organization, of course, has any control over the quality of the goods and services sold by these various entrepreneurs. Many persons patronize these

establishments in the belief that they are dealing with authorized facilities and vent their dissatisfaction on members of the authorized Volkswagen organization (RT 1070-1078).

"Modern Volkswagen Porsche Service"

In 1958 defendant was among the persons attracted by the growing success of the Volkswagen organization. He was then twenty years old, a high school graduate with little more than three years of automotive experience (RT 858-861). As the dominant feature of the trade name for his infant business, Church took plaintiff's trademark "Volkswagen" and styled himself "Modern Volkswagen and Porsche Service" (P. Ex. 12; CT 145).

Plaintiff did not learn of this casual adoption of its hallmark until 1959 when Church, prospering, moved to his present location on Cherry Avenue in Long Beach where he occupies a modern building painted light tan and carrying a sign in black letters (RT 858-859, 882-884). These new premises were publicized in a quarter-page advertisement in the local telephone directory featuring prominently the name "Modern Volkswagen & Porsche" and plaintiff's trademark, the encircled "VW" emblem (CT 146; P. Ex. 11b).

On October 16, 1959 plaintiff's attorneys wrote the first of many letters to Church (P. Ex. 27). This letter requested him to discontinue his use of any trade name incorporating the "Volkswagen" trademark, to destroy the stationery on which it appeared and to revise his telephone advertising in future directories to eliminate his infringement of the word "Volkswagen" and the encircled "VW" emblem (*ibid.*).

Church made no reply to this request nor to a second which followed it (P. Ex. 28), until plaintiff's attorneys, on December 1, 1959, advised him that the matter was to be referred to local counsel for suit (P. Ex. 29). On De-

cember 4, 1959, Church, acting through counsel, acknowledged plaintiff's protests (P. Ex. 30). In his letter, counsel declared that "he [Church] has never desired to represent his business as being an authorized service agency for the Volkswagen automobile" (*ibid.*). Use of the encircled "VW" emblem in his telephone advertisement was said not to have been authorized by him (CT 146). At the same time, the attorney for Church undertook that his client would change the trade name of his firm to "Modern Specialists." In addition, Church promised, through his lawyer, that "his next telephone listing, letterheads, invoices and business cards will make it clear that his firm is independent of the Volkswagen organization" (P. Ex. 30). Samples of this material were promised to be submitted as received from the printers.

Describing defendant as "anxious to avoid any trademark rights" of plaintiff, his attorney requested and received copies of the Patent Office registrations covering the word "Volkswagen," the letters "VW" and the encircled "VW" emblem (P. Exs. 32-33).

But, despite a renewed demand by plaintiff (P. Ex. 35), new business stationery making clear defendant's lack of connection with the authorized Volkswagen organization was never forthcoming. Nine months after Church had promised to change his trade name, investigation disclosed that he was still doing business under the name "Modern Volkswagen and Porsche Service" and that this was the name on file for his concern in the office of the Los Angeles County Clerk (P. Ex. 36).

Defendant was advised that unless his infringement of "Volkswagen" was brought to an end, suit would be brought. He was asked to discontinue the practices referred to in the correspondence and to file a "Certificate of Abandonment of the Certificate of Doing Business Under Fictitious Name" (*ibid.*).

Thereupon defendant formally adopted the trade name "Modern Specialist" and filed a certificate that he was doing business under this name (P. Ex. 37, D. Exs. D, E1,

E2). But he continued to employ the ostensibly abandoned trade name as his principal business identification.

As late as 1963, his pickup truck, as the court below found, still carried on its side, against a white background, the inscription "Modern Volkswagen Porsche Service" (CT 146; P. Ex. 16; RT 888-889). On the door of the truck and less conspicuously appeared Church's new trade name "Modern Specialist" (*ibid.*). Nowhere on the truck was there any intelligence to alert anyone that the business with which the truck was connected was "independent of the Volkswagen organization."

Only after plaintiff, early in 1963, specifically protested the language on the truck, did Church repaint it (P. Exs. 57-59). He then changed its color to gray and rewrote the inscription on its side to read:

"Independent Volkswagen—Porsche Servicing"

(P. Ex. 59, D. Ex. B3; RT 889).

His business premises continued to be identified as "Modern Volkswagen Porsche Service" until this proceeding was filed. We quote from the findings below:

> "After defendant, in 1960, formally altered his trade name to 'Modern Specialist,' he continued to use his former appellation prominently in his business.
>
> Until some time subsequent to the filing of the complaint herein, the designation 'Modern Volkswagen Porsche Service' dominated his building being stretched across its facade in large, black letters running the full width of his premises." (CT 146).

Church's official trade name "Modern Specialist" appeared in much smaller letters on one of four signboards on a pole at the front of his premises (CT 147, 153; P. Exs. 14, 15). Neither on the pole sign, nor on any other of the signs identifying his premises to the public, did the word "independent" appear. This was added only after suit was brought (CT 147-148).

"Volkswagen Service"

Early in 1962 plaintiff discovered that Church had never carried out his 1959 promise that his "telephone listing, letterheads, invoices and business cards will make it clear that his firm is independent of the Volkswagen organization" (P. Ex. 41).

His quarter-page advertisement (P. Ex. 11d; CT 146) in the local classified telephone directory was headed at this time:

"VOLKSWAGEN

AND

PORSCHE

REPAIRING & SERVICE."

Similarly, Church's repair order form (P. Ex. 18) was captioned:

"Volkswagen & Porsche Service."

His 1962 business card (P. Exs. 19b, 47) had as its most prominent feature an oval carrying the words:

"VOLKSWAGEN
PORSCHE SERVICE"

In very tiny letters, immediately above the oval appeared the word "independent."

On March 7, 1962 plaintiff's counsel wrote to Church protesting his use of the phrase "Volkswagen Service" and enclosing a detailed explanation of how Church could indicate without infringing plaintiff's marks that he repairs and services Volkswagen automobiles (D. Ex. C). The enclosure stated that plaintiff would object to any use of the word "Volkswagen" alone, or as part of a trade name, and to phrases such as "Volkswagen Service" or "Volkswagen Repairs," but not to its use to refer to genuine Volkswagen products as, for example, "Repair

of Volkswagen Cars" or "Service for Volkswagen Automobiles" (*ibid.*).

Lengthy correspondence followed (P. Ex. 39—P. Ex. 64) which produced the modifications, described below, in defendant's directory advertising and business cards, but none at all in his repair order form.

Defendant's business card was altered to read in small letters and immediately below his trade name:

"Independent Volkswagen—Porsche Service"

(P. 19d; RT 892). However, Church flatly refused to make any comparable change in his repair order form. Through his attorney he took the position that he was entitled to use the expression "Volkswagen & Porsche Service" as it then appeared on his form, without qualification or explanation (P. Exs. 49, 52, 54). Church's attorney stated unequivocally that he did not deem plaintiff's rights infringed by this language and advised plaintiff that he was prepared to defend his position should plaintiff "feel the necessity of litigating this question" (P. Ex. 54).

In consequence, as the court below found (CT 147):

> "When the complaint herein was filed the word 'Independent' did not appear anywhere on defendant's repair order form, which was headed
>
> 'Modern Specialist
>
> Volkswagen & Porsche Service.' "

"An Independent Volkswagen & Porsche Service Center"

Over the objections of plaintiff's counsel, Church in 1962 began using the directory advertisement which he has employed ever since (CT 96, 146-147; D. Ex. F, P. Exs. 11e-11g, 49-54; RT 879-880). This advertisement appears on or opposite the page in the telephone directory at which the listings for "Automobile Repairing and Service" begin and where it is best calculated to catch the eye of

the tourist in the Long Beach area requiring service for his Volkswagen vehicle (P. Exs. 11e-11g).

The silhouettes of two cars occupy the lower third of the advertisement immediately above defendant's trade name, "Modern Specialist," in small letters. One of the pictured cars is instantly recognizable as the small Volkswagen sedan, an outline known the world over (CT 147). In the center of the advertisement appears the phrase "Complete Stock Factory Parts." Dominating all else, and in letters at least twice the size used for defendant's trade name, is printed the following:

"An Independent
Volkswagen
& Porsche
Service Center."

Plaintiff advised defendant that this expression "would deceptively create the false impression that Modern Specialist offers services having the authorization or approval of our client" (P. Ex. 53). Nevertheless, the advertisement continues to this day unchanged.

"Volkswagen"

Although defendant had been advised in 1962 that he would be infringing the mark "Volkswagen" if he employed it alone (D. Ex. C), the pole sign in front of his premises when the complaint herein was filed carried a signboard reading simply "Volkswagen" (P. Exs. 14, 15; CT 147, 153). Another like it bore the word "Porsche." Two others carried defendant's trade name "Modern Specialist" and, in smaller letters, the word "Repair" (*ibid.*). Because of the thickness and size of the letters used for "Volkswagen," this word stood out clearly and boldly from its surroundings (P. Exs. 14-15).

Although counsel for Church advised plaintiff on March 14, 1963 that the pole sign would be altered and that the word "independent" would be painted on a signboard to

be placed immediately above the word "Volkswagen" (P. Ex. 60), this was never done (RT 885-887; D. Ex. B2). The sign remained unchanged until the complaint herein was filed (CT 147).

Use of "Independent" Prior to This Litigation

To recapitulate: when this proceeding began, defendant's premises were identified by signs reading "Modern Volkswagen Porsche Service" and "Volkswagen"; his repair order form carried the caption "Volkswagen & Porsche Service"; neither signs nor form contained any language disclaiming affiliation with authorized Volkswagen facilities.

Such use as Church was then making of "independent" was only in connection with peripheral aspects of his business, and even that little was due almost entirely to specific demands from plaintiff. When plaintiff first discovered in 1962 that defendant was not carrying out his 1959 promise to make clear his lack of identification with the Volkswagen organization, the word "independent" appeared only in tiny letters on his business card.

In October 1962, as part of the legend "An Independent Volkswagen & Porsche Service Center," the word "independent" entered Church's telephone advertising (CT 148), and in 1963, when he repainted his truck, it was added there also (CT 148).

When litigation with plaintiff appeared inevitable and, in fact, was deliberately invited by defendant in August 1962 to vindicate his right to use the expression "Volkswagen * * * Service," some further use was made of "independent." As the court below found:

> "After defendant had advised plaintiff that he would make no change in his repair order form and that he was prepared to defend his position in court, he began to employ a number of promotional devices containing, with minor differences in phraseology, the words 'Independent Volkswagen & Por-

> sche Service.' Among the items of this character are a paper napkin left in a customer's car to wipe up grease spots, a plastic litter bag, a matchbook, a pen and a pencil" (CT 148).

Both the napkin and the matchbook show blue lettering against a white background (P. Exs. 24, 21). The napkin (P. Ex. 24), except for the omission of a little manikin built around the encircled "VW" emblem and the Porsche shield, is a duplicate of the ones employed by authorized Volkswagen service centers at the recommendation of VWoA (P. 69i; RT 247-248).*

To what extent these promotional devices were used, the record does not indicate. While every customer necessarily saw Church's signs and invoices, only those who happened to receive one of these promotional items or a business card, or who had recourse to a telephone book, would ever have seen "independent" used in conjunction with Church's business prior to suit.

Changes in Defendant's Use of "Volkswagen" After the Complaint Was Filed

Subsequent to the initiation of this proceeding, defendant eliminated some of his more objectionable practices.

Although earlier Church's counsel had been adamant that no change would be made in defendant's invoice, the court below found:

> "After this proceeding began, defendant made changes in his repair order form in that before the printed words 'Volkswagen & Porsche Service' the word 'Independent' was added with a rubber stamp and a different size type from the printed material * * * " (CT 148).

Comparable changes were made in the signs identifying defendant's premises to the passing motorist.

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* The court below, however, found, we believe erroneously, that neither the color nor the lettering on the napkins is similar to that adopted by plaintiff (CT 149).

> "After the complaint herein was filed, the word 'Independent' was substituted for the word 'Modern' on the sign across the facade of defendant's building, changing it to read 'Independent Volkswagen Porsche Service' and the signboard on the pole sign reading 'Volkswagen' was painted over, leaving the space blank" (CT 147).

Both changes bear the indicia of purely temporary accommodations to the exigencies of this litigation. No business first prints, then overstamps, its stationery. The court below suggests that this was "evidently an attempt to save reprinting his existing supply of printed forms" (CT 148). But if this were the case, why at the trial, more than a year after the complaint was filed, was Church, according to his testimony (RT 881-882), still simply stamping on the word "independent"? Similarly, a bare signboard can scarcely be intended to be permanent. As the pole sign stood at the time of trial, it inaccurately and imperfectly described defendant's business: it disclosed nothing regarding his principal occupation, the repair of Volkswagen vehicles.

The Proceedings Below

From the outset of this litigation, Church strenuously contested plaintiff's right to relief. His answer attacked the validity of "Volkswagen" as a trademark (CT 17-18), claimed the reputation in California of authorized Volkswagen service to be poor (CT 16) and denied generally the allegations of the complaint (CT 14). At the trial defendant endeavored to establish, among other things, that his facilities can be distinguished from authorized facilities because they are not blue and white, do not employ "Memphis Bold" lettering and are identified as "independent."

Church, who took the stand to testify regarding his advertising, business cards and signs, was not asked and said nothing as to his future intentions (RT 857-916, 941-956, 1007-1051). His position throughout has been

that, except possibly for his initial adoption of the trade name "Modern Volkswagen and Porsche Service," nothing he has done has violated any right of plaintiff. At the trial he flatly took the position that he had a right to use the term "Volkswagen Service" (RT 1017-1018).

On July 20, 1966 Judge C. Nils Tavares rendered his decision. The issue of validity of plaintiff's trademark "Volkswagen" he resolved in favor of plaintiff:

> "[T]he evidence is clear that plaintiff's use of the term 'volkswagen' [*sic*], descriptive though it may be, has given the term a secondary meaning. * * * Accordingly, this Court finds that defendant is not free to make unlimited use of the term Volkswagen and that the plaintiff is entitled to what protection the law affords against the use of its trademarks" (CT 87).

The District Court's formal findings, filed on April 11, 1967, were even more explicit on this score. Judge Tavares found that "Volkswagen" is a registered trademark (CT 139); that such registration is in full force and effect, unrevoked and uncancelled; that five years after such registration went into effect plaintiff filed the affidavits provided for in sections 8(a) and 15 of the Lanham Act, 15 U.S.C., sections 1058(a) and 1065; that since at least 1956 "Volkswagen" has been the dominant word in plaintiff's own name and since April 1965 in that of authorized Volkswagen dealers in defendant's area (CT 139); that "Volkswagen" has been extensively used and advertised as a trademark for Volkswagen products and as a service mark in connection with the maintenance and repair of Volkswagen products (CT 139-140); and that the goodwill inhering in "Volkswagen" as a trade name, trademark and service mark, which the court found to be in excess of $10,000, is the property of plaintiff (CT 143).

The attack defendant had made on the reputation of the local California Volkswagen dealers was disregarded in the decision and findings below, but defendant's third point was resolved in his favor.

Stating that defendant may not "mislead the public into believing that he is part of the plaintiff's organization" (CT 87), the court below declared, in its decision, that defendant has avoided doing so by not using plaintiff's "colors or style of lettering" and by giving "adequate prominence to the term 'Independent' in connection with every use of the name Volkswagen" (CT 90).

However, as the court's findings reflect, not until after the complaint was filed did defendant employ the term "Independent" in connection with his use of plaintiff's mark "Volkswagen" on his signs or repair order (CT 147). But what defendant had done prior to trial is treated as

> "possibly immaterial in the light of this Court's belief and finding that any such previous practices were not indulged in by the defendant with any belief on his part that the same constituted a violation of plaintiff's rights or constituted unfair competition, and are not intended in the future to be indulged in by the defendant and this Court's final conclusions, based primarily on what defendant was doing, or intended to do, at or after the time of the trial" (CT 145).

Furthermore, the findings also drain of any significance such differences as exist between the appearance of defendant's premises and those of members of the authorized Volkswagen organization because the court finds that not all Volkswagen dealers conform to the general pattern so as to be distinguishable because of their style or coloring of lettering (CT 143-144).

Nevertheless, solely on defendant's use of the word "independent," the court adhered to its original determination that he adequately distinguishes his business from plaintiff's organization (CT 148). Although Judge Tavares had explicitly found that the "good-will inhering in 'Volkswagen' as a * * * service mark is the property of plaintiff" (R. 143), he declared that plaintiff "does not have the exclusive right to the use of the wording 'Volkswagen Service' or 'VW Service'" (CT 149). Concluding that defendant has not infringed any of plaintiff's rights except

by his use "of the word 'Volkswagen' as part of his business name in 1958 and part of 1959 which use was in a proprietary sense instead of denotive sense," (CT 151) the court below dismissed the complaint (CT 175-176).

Specification of Errors Relied Upon

I.

The court erred in concluding as a matter of law that, with the exception of the use by defendant of the word "Volkswagen" as a part of his business name in 1958 and 1959, none of defendant's practices enumerated in the findings of fact, individually or collectively, infringe any of the rights of plaintiff.*

II.

The court erred in failing to find that defendant has infringed and is still infringing plaintiff's trade name, trademark and service mark "Volkswagen" by using it in the manner of a trade name and service mark to identify his business and services to the public in the following ways, among others: identifying his business by the legends "Modern Volkswagen and Porsche Service," "Independent Volkswagen Porsche Service" and "An Independent Volkswagen & Porsche Service Center"; identifying his premises by displaying "Volkswagen" alone; and identifying his services as "Volkswagen Service" and "Independent Volkswagen Service."

III.

The court, having found that the goodwill inhering in "Volkswagen" as a trade name, trademark and service mark is the property of plaintiff, erred in finding that plaintiff does not have the exclusive right to use of the terms "Volkswagen Service" and "VW Service."

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* These specifications are based upon the "Statement by Plaintiff-Appellant of Points on Appeal." The issues, however, have been transposed and rephrased to correspond with their treatment in the argument which follows.

IV.

The court erred in not finding that defendant, in employing plaintiff's trade name, trademark and service mark "Volkswagen" to inform the public that he sells services for Volkswagen vehicles and in advertising and identifying his services as "Independent Volkswagen Service," failed to discharge the duty the law imposes to take reasonable precautions to avoid confusion with "Volkswagen" facilities and "Volkswagen Service."

V.

The court erred in finding the defendant has made reasonable efforts to meet plaintiff's objections to his use of its name and mark "Volkswagen" and that he has avoided creating the impression that he is part of the Volkswagen organization.

VI.

The court erred in finding that a napkin used as a promotional device by defendant differs in lettering and coloring from that used by authorized Volkswagen facilities.

VII.

The court erred in concluding that use of a blue and white color scheme or Memphis Bold style of lettering by a garage specializing in the service of Volkswagen vehicles is not necessarily unfair competition.

VIII.

The court erred in not granting plaintiff an injunction against practices which the court found were still being engaged in by defendant at the time the complaint herein was filed, even if, as the court concluded, his present practices were unexceptionable.

IX.

The court erred in finding that defendant acted in good faith in the use of the plaintiff's name and mark "Volks-

wagen'' and does not intend in the future to repeat his past practices.

X.

The court erred in denying plaintiff the relief prayed for in the complaint and in not enjoining defendant from employing ''Volkswagen'' as a trade name or service mark or in the style of authorized Volkswagen repair and service facilities.

XI.

The court erred in dismissing the complaint herein.

Summary of Argument

I.

The symbol with which the public identifies plaintiff and the services sold under its aegis is ''Volkswagen.'' The goodwill inhering in this term as a trade name, trade mark and service mark is due solely to plaintiff's efforts and expenditures and belongs exclusively to plaintiff. Other persons may use ''Volkswagen'' descriptively to tell the world that they service products sold under that mark, but no one else may use it in the fashion of a trade name, trademark or service mark, regardless what qualifying language is added. Accordingly, the court erred, as a matter of law, in declaring that plaintiff ''does not have the exclusive right to use of the wording 'Volkswagen Service' or 'VW Service.' ''

Defendant is using ''Volkswagen'' as a trade name and service mark to identify himself and his services when he describes his business as ''Modern Volkswagen Porsche Service,'' ''Independent Volkswagen Porsche Service'' and ''An Independent Volkswagen Service Center''; dubs his services ''Volkswagen Service'' and ''Independent Volkswagen Service''; and identifies his premises with a sign reading ''Volkswagen.'' Therefore, the court below erred in acquitting defendant of any infringement of plaintiff's name and marks.

II.

Even if defendant were using "Volkswagen," not as a trade name or service mark, but simply descriptively, he has not discharged the duty the law imposes to avoid trespassing on plaintiff's goodwill. Mistakenly the court below thought that the law required no more than that defendant, in informing the public that he specializes in repairing Volkswagen vehicles, not "mislead the public into believing that he is part of the plaintiff's organization" (CT 87). In fact, the law imposes a very different and more positive obligation. It is not enough that nothing be done to mislead the public. What the law requires is affirmative conduct to avoid confusion. There is a "duty to explain." Had the court below applied the proper test to defendant's conduct, it could not have concluded, as it did, that defendant's current signs and advertising do not constitute trademark infringement and unfair competition. The ambiguous word "independent," with its multiple meanings, does not constitute the clear and unmistakable disclaimer of connection between defendant and plaintiff necessary to dissipate the likelihood of confusion which defendant creates by claiming to be selling "Volkswagen Service."

III.

Numerous errors stud the court's formal findings of fact and conclusions of law. They relate to the use of "Volkswagen Service" by unauthorized repair facilities, the significance of the word "independent" and "authorized," defendant's response to plaintiff's objections to his use of "Volkswagen," a promotional device used by defendant and the use of "Memphis Bold" and blue and white. Some are erroneous because they are based upon insufficient evidentiary support while the balance involve errors of law.

IV.

Finally, since defendant did not consistently employ "independent" in conjunction with "Volkswagen Service" until after plaintiff appealed to the courts for relief, the

court below erred in dismissing the complaint and denying plaintiff injunctive relief, even under the view it took of the law.

Not until after the complaint herein was filed did defendant discontinue identifying his premises as "Modern Volkswagen Porsche Service," recognized by the court below to be improper, cease describing his services as "Volkswagen * * * Service," discontinue his display of the word "Volkswagen" alone and preface each use of "Volkswagen" with the word "independent."

Since defendant disputes the validity of plaintiff's marks, has given no assurance whatever against resumption of his prior practices and will necessarily be continuing to employ plaintiff's name and marks in connection with his business, plaintiff is entitled to a judgment vindicating its rights and prohibiting the repetition of infringements which ceased only under pressure of this litigation. Such relief is the more necessary because, due to the surrounding circumstances, there is great likelihood of recurrence.

ARGUMENT

I

The court below erred in sanctioning defendant's use of plaintiff's trade name and trademark "Volkswagen" as a trade name and service mark to identify his business and his services.

A.

Only plaintiff and its licensees may employ "Volkswagen" or "VW" as a trademark, service mark or trade name.

The court below misapprehended the consequences which the law attaches to its findings that since 1956 plaintiff "has extensively used and * * * advertised and publicized in the United States the word 'Volkswagen', [and] the letters 'VW' * * * as trademarks on and for

Volkswagen Products and as service marks for services furnished in connection with the maintenance and repair of Volkswagen Products" (CT 139-140); that, since that time at least, "Volkswagen" has been the dominant word in plaintiff's own name (CT 139); and that the "good-will inhering in 'Volkswagen' as a trade name, trademark and service mark is the property of plaintiff" (CT 143).

It is well settled, in fact, it is fundamental to the law of trademarks and unfair competition that it necessarily follows from these findings that only plaintiff and its licensees may use "Volkswagen" or "VW" as a trademark, trade name or service mark. No one else may employ "Volkswagen" for such purpose. The prohibition on use of "Volkswagen" as a trademark, trade name or service mark by others is absolute, regardless of any explanatory language or disclaimers with which it is coupled. While "Volkswagen" may still be used by Church in good faith as a description of his business and services, qualified properly so as not likely to create confusion, under no circumstances, whether coupled with "independent" or not, may it be used as a trademark is used, that is, as a symbol to attract public attention.

> "The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same —to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress." *Mishawaka Rubber & Woolen Mfg. Co.,* v. *S. S. Kresge Co.,* 316 U.S. 203, 205 (1942).

Both the findings and the results reached by the court below are incompatible with plaintiff's exclusive right to the commercial magnetism created for "Volkswagen" as a service mark. In square conflict is the court's statement in its findings that "Plaintiff does not have the exclusive right to the use of the wording 'Volkswagen Service' or 'VW Service'" (CT 149). This necessarily led to the court's erroneous conclusion that none of defendant's practices, except his use of " 'Volkswagen' as part of his business name in 1958 and part of 1959 * * * infringe any of the rights of plaintiff" (CT 151).

Insofar as this Court derives jurisdiction over this proceeding from the Lanham Act, federal law is controlling. Similarly, rights vindicated under the Court's diversity jurisdiction are governed by state law. *National Van Lines* v. *Dean,* 237 F.2d 688, 691 (9th Cir. 1956). Since diversity jurisdiction is present here, the court below deems state law to govern also to the extent that pendent jurisdiction is involved (CT 86).

So far as our research has disclosed, California* and federal law are in total agreement on the relevant principles applicable to this proceeding. Both rely on the same common-law doctrines and have evolved similarly. Accordingly, we have drawn on precedents from both sources.

B.

Use of a trademark, service mark or trade name to denominate or identify particular goods, services or business is reserved exclusively to the owner.

Virtually all words employed as trademarks are susceptible of two distinct uses. One is to denominate or name a definite species of commodity or services or a particular business. Thus " '*Kodak*' stamped upon a camera, '*Kodak*' used as the flare-head in an advertise-

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* Certain basic principles are codified in the California Business and Professions Code, the relevant sections of which are reproduced in Appendix A.

ment of the same article, '*Kodak*' in a price-list enumerating different brands of cameras, are all examples of denominative uses of the term 'Kodak'." Handler and Pickett, *Trade-Marks and Trade Names*, 30 Colum. L. Rev. 168, 170 (1930).

The same word may, however, be used as descriptive of the qualities of a product rather than indicative of its source, as, for example, "Our cameras are made according to the Kodak principle." *Ibid.* Use of this word in this second, or descriptive, sense is open to the whole world, subject to the obligation, which we discuss below (pp. 51-53, *infra*), to take reasonable precautions to avoid confusion of the public.

But only the owner of the mark or name may employ it in the first, or denominative, role. Anyone else who uses it as the name of, or the means of identifying his goods, services or business, or even in such a way that prospective purchasers are likely to regard it as being used for such purpose, invades the exclusive right to use of the owner of such mark or name. Restatement, Torts, sections 727, 717 (1938); *Baglin* v. *Cusenier Co.*, 221 U.S. 580, 600 (1911); *Celluloid Mfg. Co.* v. *Cellonite Mfg. Co.*, 32 Fed. 94 (Cir. Ct. N.J. 1887) (Bradley, J.); *Safeway Stores, Inc.* v. *Safeway Properties, Inc.*, 307 F. 2d 495, 499 (2d Cir. 1962).

Thus, for example, after "Tobasco" had gained goodwill as a trade name for a particular manufacturer's sauce, a subsequent manufacturer could not employ it to designate his product although he was permitted to state that his product was manufactured from tobasco pepper provided this was done in such manner as clearly to distinguish his sauce from the original. *Trappey* v. *McIlhenney Co.*, 281 Fed. 23, 25 (5th Cir. 1922); *McIlhenny* v. *Bulliard*, 265 Fed. 705 (W.D. La. 1920). And a reseller of shingles marketed under the trademark "Eternit" could not take as his trade name "Eternit Roofing Corporation." *American Insulation Co.* v. *Eternit Roofing Corp.*, 14 F. 2d 235 (E.D. N.Y. 1926).

The rationale underlying the distinction drawn by the courts between using a word as a trademark or trade name and employing it descriptively emerges most strongly in the early cases dealing with descriptive or geographic terms from which the rule developed, that when a descriptive word has acquired a second meaning

> "its use by another in this secondary sense will be restrained as unfair and fraudulent competition, and its use in its primary or common sense confined in such a way as will prevent a probable deceit by enabling one maker or vendor to sell his article as the product of another." *Computing Scale Co.* v. *Standard Computing Scale Co.,* 118 Fed. 965, 967 (6th Cir. 1902).

No more than a brewer located in Stone could call his brew Stone Ale, nor a manufacturer in Waltham identify his watches as Waltham Watches, can anyone other than plaintiff selling services for Volkswagen vehicles advertise them as "Volkswagen Service." *Thompson* v. *Montgomery,* 41 Ch. Div. 35 (1888), *aff'd,* [1891] A.C. 217; *American Waltham Watch Co.* v. *United States Watch Co.,* 173 Mass. 85, 53 N.E. 141 (1899). Accord: *Elgin National Watch Co.* v. *Illinois Watch Co.,* 179 U.S. 665, 674 (1901).

C.

The prohibition against the trademark use of another's name or mark is not affected by the addition of qualifying or explanatory language.

Because one person's service mark, trademark or trade name may not be used to identify anyone else's services, products or business to the public, it makes no difference what disclaimers or qualifying adjectives accompany such invasion of the first user's exclusive preserve. Such disclaimers or qualifications are significant only as to the legitimacy of the use of another's trademarks for the only purpose for which they may be used, which is not as a commercial symbol, but to convey information not otherwise communicable. Because, even in the case of such limited use, an affirmative duty exists to avoid confusion,

sought to cover their products, services and businesses with the commercial magnetism built up for the trade names and trademarks identifying the original manufacturers and their franchised dealers and facilities. Pursuant to the general principles just discussed, these efforts have been consistently repelled. Conceding the right of such traders to use the manufacturer's mark descriptively, the courts have unanimously held that neither the manufacturer's mark nor his name can be imitated or used as a trademark or service mark regardless what qualifications are added. The decision below is the first to reach a contrary conclusion.

Thus, a manufacturer or seller of replacement parts for a specific make of automobile engages in trademark infringement and unfair competition when the original manufacturer's trademark is used like a trademark, not simply descriptively to communicate the information that the parts will fit a specific make of automobile. *Metal Stamping Corp.* v. *General Motors Corp.,* 33 F.2d 411 (7th Cir. 1929); *Ford Motor Co.* v. *Wilson,* 223 Fed. 808 (D.R.I. 1915). See also, *Akron-Overland Tire Co.* v. *Willys-Overland Co.,* 273 F.2d 674 (3d Cir. 1921); *Duro Co.* v. *Duro Co.,* 27 F.2d 339 (3d Cir. 1928).

In *Ford Motor Co.* v. *Wilson, supra,* the defendant manufactured and sold various parts adapted for use in Ford automobiles which he advertised extensively, preceding the name of the part with the word "Ford." Issuing an injunction against these practices, the District Court said:

> "While the defendant has a right to inform the public that he is manufacturing articles suitable for use on Ford machines, he should not be permitted to advertise them as Ford articles, but should be required to describe them in such a way as to indicate that they are not manufactured by the complainant.
>
> * * *
>
> While the defendant may have considered himself morally justified in calling these articles Ford

> articles, because they were adapted for use in Ford machines, such an opinion would be erroneous, since, in common acceptation, the word 'Ford' would indicate, not merely adaptation to use in Ford machines, but articles manufactured by the complainant company." 223 Fed. at 808-809.

Similarly, defendant here has a right to inform the public that he is selling services for Volkswagen automobiles. He should not be permitted, however, to advertise what he is doing as "Volkswagen Service," but should be required to describe himself in such a way as to indicate that his services are not provided under the aegis of plaintiff.

In fact, this is the position the courts have uniformly assumed. Numerous decisions hold that a retail outlet or service station specializing in the sale or repair, or both, of the products of a particular automobile manufacturer engages in trademark infringement or unfair competition, or both, if he uses or imitates the manufacturer's name or mark in his trade name or uses such mark to identify himself or his services. *Ford Motor Co.* v. *Benjamin E. Boone, Inc.*, 244 Fed. 335 (9th Cir. 1917); *General Motors Corp.* v. *Smith*, 138 U.S.P.Q. 382 (S.D. Cal. 1963); *Volkswagenwerk G.m.b.H.* v. *Frank*, 198 F. Supp. 916 (D. Col. 1961); General *Motors Corp.* v. *Mac Co.*, 138 U.S.P.Q. 169 (D. Col. 1963); *Lincoln Motor Co.* v. *Lincoln Automobile Co.*, 44 F.2d 812, 818 (N.D. Ill. 1930); *Ford Motor Co.* v. *Helms*, 25 F. Supp. 698 (E.D.N.Y. 1938); *Volkswagenwerk Aktiengesellschaft* v. *Volks City. Inc.*, Civil No. 403-64, D.N.J., June 23, 1964, unreported opinion by Judge Meany, *aff'd*, 348 F.2d 659 (3d Cir. 1965); *Volkswagenwerk Aktiengesellschaft* v. *Dreer*, 253 F. Supp. 37 (E.D. Pa. 1966); *Ford Motor Co.* v. *Weibel*, 262 F. Supp. 932 (D.R.I. 1967); *Dayton* v. *Imperial Sales & Parts Co.*, 195 Mich. 397, 161 N.W. 958 (1917); *Fiat Societa Per Azioni* v. *Vaughan*, 7 Misc. 2d 4, 166 N.Y. Supp. 2d 39 (1957), *modified and aff'd*, 5 App. Div. 2d 821, 170 N.Y. Supp. 2d 627 (1st Dep't 1958).

In *Ford Motor Co.,* v. *Benjamin E. Boone, Inc., supra,* this Court reversed the dismissal of a complaint brought by the manufacturer of the Ford automobile to restrain as unfair competition the use made of its trademark and other practices engaged in by a reseller of its automobiles. The complaint, as summarized by this Court, charged that the defendants "maintain in a conspicuous place upon their business building the word 'Ford's' "; that the cans of automobile oil on their premises carried a poster with the word "Ford" thereon in a triangle imitative of plaintiff's trademark and the words "Benjamin E. Boone & Co., Ford Agents, Portland, Oregon" at the bottom; that they tell prospective purchasers of Ford cars that they are Ford agents and that they obtain Ford cars in quantity from the plaintiff's factories; and that the local telephone directory carried the following listing: "Boone, Benj. E. & Co., Ford Auto Agency, 514 Alder St., Main 3966."

This Court held that the right of the defendants to advertise the availability of Ford cars at their premises did not sanction the use they were making of the Ford name and mark.

> "It is too narrow a view to take of the scope of the doctrine of unfair competition to say, as is suggested, that there can be no unfair competition in such case because admittedly the defendants are selling genuine 'Ford' cars. If there is no advantage to them and no corresponding disadvantage to the plaintiff, why the pretense of being a Ford agency?
>
> * * *
>
> 'A distinctive name of a place of business will be protected as a trade-name against use or imitation by others. Deceptive signs and names upon a place of business or deceptive dress of a store will be enjoined. The right to the exclusive use of a distinctive name or sign in a particular locality may be acquired.' 38 Cyc. 826.
>
> It is suggested in their brief that the defendants did not expressly claim or advertise that they were 'agents of the Ford Motor Company.' It is true that they did not, by advertisement or otherwise, make such claim with precision or in technical lan-

guage, but such a defense is as common as it is futile. As was said by Mr. Justice Bradley in Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C.C.) 32 Fed. 97:

'It is not identical with the complainant's name. That would be too gross an invasion of the complainant's rights. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary, unsuspecting customer is obnoxious to the law.' '' 244 Fed. at 338.

The word ''Lincoln'' having acquired a secondary meaning in the automobile trade, a used car dealer specializing in Lincoln automobiles was enjoined ''from using 'Lincoln' in its corporate name or in any other manner that may tend to cause the public to believe that defendant is in any way connected with the plaintiffs.'' *Lincoln Motor Co.* v. *Lincoln Automobile Co., supra.* Such relief was held to be necessary to protect the goodwill and reputation of ''Lincoln.''

''The adoption of 'Lincoln' as a part of its corporate name is about the strongest means defendant could adopt to cause confusion, as the public cannot be expected to differentiate between Lincoln Motor Company and Lincoln Automobile Company. There is no quarrel with defendant's sale of used Lincoln cars as such, but with the fact that when defendant sells such car under the corporate name it has adopted it does not, so far as the public is concerned, sell it as its car, but rather as the property of the Lincoln Motor Company or of its authorized dealer, from whom the public has come to expect certain things and back of whom the public sees the Lincoln Motor Company.'' 44 F.2d at 816.

All of the following trade names have been enjoined at the request of the automobile manufacturers owning the mark they infringed: ''Weibel Ford Annex'' [*Ford Motor Co.* v. *Weibel, supra,* 262 F. Supp. 932 (D.R.I. 1967)];

"Volks City, Inc." [*Volkswagenwerk Aktiengesellschaft* v. *Volks City, Inc., supra,* 348 F.2d 659 (3d Cir. 1965)]; "Smith's Chevrolet Service" [*General Motors Corp.* v. *Smith, supra,* 138 U.S.P.Q. 382 (S.D. Calif. 1963)]; "Fiat Sales and Service" [*Fiat Societa Per Azioni* v. *Vaughan, supra,* 7 Misc. 2d 4, 166 N.Y. Supp. 2d 39 (1957), *modified and aff'd*, 5 App. Div. 2d 821, 170 N.Y. Supp. 2d 627 (1st Dep't 1958)].

Incorporation of a manufacturer's mark into a local company's trade name is only one way, however, of misusing such mark to suggest a connection which does not in fact exist. Any use of such mark to identify another's business or services is improper.

In *Dodge Bros.* v. *East,* 8 F.2d 872 (E.D.N.Y. 1925), a used car business engaged principally in the resale of used Dodge cars could not, the court said, call himself a "Dodge Dealer," employ the words "Dodge Service" or "Dodge Service Station," or reproduce the word "Dodge" in the distinctive letters and coloring used by plaintiff.

Similar limitations have been placed on the use of an automobile manufacturer's mark by a garage or service station specializing in its repair. *Ford Motor Co.* v. *Helms, supra,* 25 F. Supp. 698 (E.D.N.Y. 1938); *General Motors Corp.* v. *Mac Co., supra,* 138 U.S.P.Q. 169 (D. Col. 1963); *General Motors Corp.* v. *Smith, supra,* 138 U.S.P.Q. 382 (S.D. Calif. 1963).

In *Ford Motor Co.* v. *Helms, supra,* the plaintiff obtained relief against the display of the word "Ford" on a large, verticle neon sign in front of the defendant's premises. Extending horizontally from the same sign, but in smaller letters, was the word "Repairs." In granting the injunction the court stated:

> "The plaintiff seeks to protect its recognized good-will and trade-marks from the loss that might come to it through the false assumption by the owners of cars of its manufacture, that the defendants maintain an authorized 'service station' where re-

> pairs upon Ford cars are made by those who have been selected by the plaintiff as competent to do that; and where authentic parts of the plaintiff's manufacture are used for necessary replacements.
>
> * * *
>
> The integrity of such service stations is important alike to the users and to the manufacturers of any well-known make of cars, and consequently the interests of the latter are at stake in the preservation of that integrity.
>
> It is equally clear that the defendants have the right to repair cars of the plaintiff's and others' manufacture, and to tell the public that such is their calling. But they may not do it under any guise which would create or reasonably tend to create the impression that they repair Ford cars only (if that is not the truth—and it was said not to be by their attorney at argument) as a Ford service station; or that they are authorized dealers in Ford cars." 25 F. Supp. at 699.

As this case recognizes, the integrity of authorized service facilities is important not only to the manufacturer, but to the public. It cannot be too often repeated that, as this Court noted in *Ford Motor Co.* v. *Benjamin E. Boone, Inc., supra,* an automobile is not a sack of potatoes. If it is mishandled or improperly serviced, it can become a lethal instrument. It is, therefore, peculiarly important that the courts protect the public in their right to know to whom they are giving their patronage when they select a garage to service or repair their cars.

It is significant that the District Court in *Ford Motor Co.* v. *Helms, supra,* acted even though very clear language of disclaimer appeared below the display of the word "Ford" reading:

> "We Repair Ford Cars And do not Act as Authorized Dealers."

The latter phrase, the court held, did not cure the invasion of plaintiff's rights since, due to "its relative

insignificance compared with the Ford sign, [it] might well escape the attention of all but the most alert of intending customers."

In parallel circumstances, similar disclaimers have also been held not to affect the automobile manufacturer's right to relief against misuse of his trademark or trade name.

In *Metal Stamping Co.* v. *General Motors Corp., supra,* 33 F. 2d 411, 412 (7th Cir. 1929), the trademarks of the original manufacturer were affixed to hub caps sold as replacements. An injunction followed despite the fact that the "cards on which the hub caps were placed bore the printed statement that the maker was one of appellants." "Purchasers," the court observed, "may not notice the printing on the cards, and may act wholly upon the faith of the representation of origin which the name on the cap is likely to convey."

A decision of the highest court in Michigan involving the trademark "Imperial" is also instructive. *Dayton* v. *Imperial Sales & Parts Co., supra,* 195 Mich. 397, 161 N.W. 958 (1917). In that case after the "Imperial Automobile Company," having manufactured several thousand automobiles, went out of business, two companies were organized for the purpose of selling repair parts for the Imperial automobiles in operation. Plaintiffs, who succeeded to the automobile company's interest in the name "Imperial" assumed the name "Imperial Automobile Parts Company." Subsequently two former employees of the Imperial factory formed a corporation under the name "Imperial Sales & Parts Company."

The very first use by the defendants of this name on their stationery was accompanied by a statement in the corner of the page reading, in red letters: "This company is in no way connected with the Imperial Automobile Parts

Company." And the only circular sent out by the defendants included the following explicit disclaimer:

> "Let us mention one fact: That we are not connected in any way with the Imperial Automobile Company, which has discontinued the manufacture of automobiles, the Standard Motor Parts Company, the Imperial Automobile Parts Company or any other person, firm or corporation." 195 Mich. at 401; 161 N.W. at 959.

The trial court would have permitted the defendants to continue using the name "Imperial Sales & Parts Co." if coupled at all times with a similar disclaimer of connection with plaintiff. The Supreme Court of Michigan disagreed, however, and held the plaintiff to be entitled to an absolute injunction against simulation of the earlier company's trade name:

> "Unquestionably defendants or any one else may legally engage in the business of repairing and supplying new parts to old automobiles as freely as they can go into the grocery business. It is also true that there is no law against their specializing in any particular make or model and so advertising, but they may not under an imitative, assumed name benefit themselves to the injury of a rival to whom the imitated name belongs * * *." 195 Mich. at 404; 161 N.W. at 960.

In sum, then, the automobile cases apply the general principles earlier discussed. Specialization in the sale or repair of automobiles identified by a particular trademark and the accompanying right to advertise such specialization to the public does not excuse imitation of the automobile manufacturer's trade name or use of his mark as a trademark or service mark to identify another's business, products or services, regardless what disclaimers accompany such imitation or false identification.

E.

Defendant is using plaintiff's trade name and service mark "Volkswagen" to identify his own business and services.

The record and the findings show that since defendant first opened his repair shop he has done business under a trade name imitative of plaintiff's and has used plaintiff's trademark and service mark "Volkswagen" not simply descriptively to advise the public that he specializes in the repair of Volkswagen vehicles but as a service mark to identify himself and his services. Although plaintiff's objections and the compulsion of this litigation have put a stop to his most flagrant infringements, even now his conduct invades plaintiff's exclusive right to "Volkswagen" as a trademark, service mark and trade name and jeopardizes plaintiff's goodwill. The contrary conclusion reached by the court below is based upon a misconception of the restrictions which the law places upon the use which third parties can make of another's trademarks and the extent to which a valuable trade name can be imitated.

The court below did not distinguish between use of "Volkswagen" as a trade name and service mark and use of it descriptively. It erroneously deemed any use proper, if qualified by the word "independent." But as the authorities just reviewed demonstrate, this is not the law. No one but the rightful owner of the service mark "Volkswagen" that is, no one but plaintiff, may use it as a service mark, no matter with what disclaimer or additional language such use is joined. Thus, what the court below should have determined is whether or not defendant was using "Volkswagen" in such a way that "prospective purchasers are likely to regard it as the name of, or the means of identifying, his goods, services or business." Restatement, Torts, section 727 (1938). If the answer to this question was in the affirmative, then it was irrelevant whether or not in using "Volkswagen" in this fashion he preceded it with the word "independent," since such use is absolutely prohibited.

Had the court evaluated defendant's practices under the proper standard, it necessarily would have had to conclude that defendant has infringed plaintiff's trademarks, service marks and trade name and engaged in unfair competition by use, in the fashion of a trade name, of the phrases "Modern Volkswagen Porsche Service" and "Independent Volkswagen Porsche Service"; by displaying the word "Volkswagen" alone to identify his premises to the public; by claiming to provide "Volkswagen Service"; and by advertising his business, service and parts in such a fashion as to identify all three by plaintiff's mark "Volkswagen."

Although the court below treated the question of infringement as purely a question of fact, it partakes, as this Court has recognized in analogous circumstances, more of the character of a conclusion of law. *Continente* v. *Continente,* 378 F. 2d 279, 281 (9th Cir. 1967). Accordingly, an independent determination should be made at this level regarding the legitimacy of defendant's imitation of plaintiff's trade name and his use of "Volkswagen" as a service mark.

(1) *"Modern Volkswagen Porsche Service"*

That the business now conducted by defendant was initially identified as "Modern Volkswagen Porsche Service" is incontrovertible and the court below so found (CT 145). Further, defendant conceded, and the court agreed, that the adoption of this trade name invaded plaintiff's rights.

This name is an invasion of plaintiff's rights and a source of confusion just as were "Lincoln Automobile Company" [*Lincoln Motor Co.* v. *Lincoln Automobile Co., supra,* 44 F. 2d 812, 818 (N.D. Ill. 1930)], "Smith's Chevrolet Service" [*General Motors Corp.* v. *Smith, supra,* 138 U.S.P.Q. 382 (S.D. Calif. 1963)], and "Fiat Sales and Service" [*Fiat Societa Per Azioni* v. *Vaughan, supra,* 7 Misc. 2d 4, 166 N.Y. Supp. 2d 39 (1957), *modified and aff'd,*

5 App. Div. 2d 821, 170 N.Y. Supp. 2d 627 (1st Dep't 1958)].

However, in the view of the court below, defendant's invasion of plaintiff's rights ceased when defendant technically abandoned this trade name in favor of "Modern Specialist" (CT 151). This approach ignores reality. The public neither knows nor cares what name appears in the files of the local County Clerk. They do not determine the trade name of a business by consulting these files. The question is what would a prospective customer be likely to think to be the trade name of defendant's business from its general appearance.

As the court below found:

> "Until some time subsequent to the filing of the complaint herein, the designation 'Modern Volkswagen Porsche Service' dominated his building being stretched across its facade in large, black letters running the full width of his premises" (CT 146).

Certainly, those who knew defendant first under this name must have assumed from this display that it continued to be his trade identification. As for newcomers, the old name dominating the premises was far more likely to catch their eye than the unobtrusive "Modern Specialist" on the pole sign in front.

Thus, when the complaint herein was filed, defendant was still using "Modern Volkswagen Porsche Service" in the manner of a trade name and thus was clearly acting in derogation of plaintiff's rights.

(2) *"Independent Volkswagen Porsche Service"*

By a parity of reasoning, "Independent Volkswagen Porsche Service" which, only subsequent to the filing of the complaint herein, replaced "Modern Volkswagen Porsche Service" along the facade of defendant's building invades plaintiff's rights to the exclusive use of "Volkswagen" as a trade name and service mark.

The manner in which this language is displayed is such that a passing motorist might well assume it to be the name of the premises to which it is affixed. At pages 44-47, *infra*, we deal with the impropriety of Church's claim to render "Volkswagen Service," whatever the context in which this term appears, but here the impropriety of that claim is aggravated by employing it not only to identify the services offered for sale but also apparently as part of the name of the business making such offer.

The catch-word in the legend "Independent Volkswagen Porsche Service" is "Volkswagen." That "Volkswagen" is preceded by the word "independent" no more saves this business identification from improperly simulating plaintiff's trade name and mark than did prefacing "Chevrolet Service" with "Smith's" [*General Motors Corp.* v. *Smith, supra,* 138 U.S.P.Q. 382 (S.D. Calif. 1963)] or "Ford Agency" with "Weibel" [*Ford Motor Co.* v. *Weibel, supra,* 262 F. Supp. 932 (D.R.I. 1967)]. Employment of "Volkswagen" as part of a trade name is a denominative use and is, therefore, foreclosed to defendant, regardless what else such name includes.

(3) *"Volkswagen"*

Defendant's sole right to use of "Volkswagen" is informationally, to describe the services he stands ready to render. And even then, he cannot reproduce it in different letters from the text of which it forms a part since then "a casual purchaser might look no further and might be deceived." *Prestonettes, Inc.* v. *Coty,* 264 U.S. 359, 368-369 (1924).

But here the findings show that until the complaint was filed, plaintiff's trademark "Volkswagen" appeared alone on a signboard in front of defendant's premises (CT 147, 153). No text whatever surrounded it, let alone one in the same size lettering. Obviously, "Volkswagen" was not being used to communicate information but rather as a symbol for its commercial magnetism. Just such display in isola-

tion of the manufacturer's trademark drew the disapprobation of the courts in *Ford Motor Co.* v. *Benjamin E. Boone, Inc., supra,* 244 Fed. 335 (9th Cir. 1917), and *Ford Motor Co.* v. *Helms, supra,* 25 F. Supp. 698 (E.D.N.Y. 1938).

That neither Memphis Bold lettering nor blue and white colors were employed does not aid defendant. Neither plaintiff nor its licensees consistently reproduce the mark in any particular script nor in the blue and white color combination. In advertising, promotional literature and even on building signs, the word "Volkswagen" is often reproduced in modern lettering similar to that employed by Church (*e.g.*, P. Exs. 69, 70f). As the court below found, neither colors nor style of lettering necessarily mark authorized Volkswagen dealers from unauthorized workshops (CT 143-144).

But even if use of a particular color combination and lettering were uniform, failure to duplicate incidental features should be no more effective to avoid condemnation of what is clearly a trademark or service mark use than were the clear and explicit disclaimers in *Ford Motor Co.* v. *Helms, supra,* 25 F. Supp. 698 (E.D.N.Y. 1938), or *Dayton* v. *Imperial Sales & Parts Co., supra,* 195 Mich. 397, 161 N.W. 958 (1917). The average purchaser would not stop to evaluate the significance of the difference in color or lettering. The mark "Volkswagen" is the symbol which identifies. What is charged here is infringement of a particular mark, not imitation of a trade dress. Had defendant duplicated lettering and coloring, he would have aggravated his misconduct by heightening the misleading impression conveyed, but that he went no further does not make what he did proper. His display of the word "Volkswagen" clearly exceeded any license he enjoys to tell the world that he repairs vehicles of this manufacture.

(4) *"Volkswagen Service"*

The court below explicitly found that "Volkswagen" was not only a trade name and trademark but was also a

service mark (CT 139-140). Further it found that the good-will inhering in it as a service mark belongs to plaintiff (CT 143). There would seem to be no more explicit way of employing "Volkswagen" as a service mark than to identify specific services as "Volkswagen Service." On its face, this is infringement of plaintiff's service mark.

As the court below found:

> "In advertising and promotional material originating with plaintiff or VWoA the general practice is to use the trademark 'Volkswagen' or its trademarked abbreviation 'VW' to identify services performed by the authorized domestic Volkswagen organization and to refer to such services simply as *'Volkswagen Service'* or *'VW Service'*" (CT 142) (emphasis added).

This is exactly the way that authorized service facilities are identified throughout American industry. The manufacturer's trademark is employed as an adjective in front of the word "service." Manufacturers have repeatedly secured protection from the courts against use of such phraseology by a service establishment. "Yale Lock Service" [*Yale & Towne Mfg. Co.* v. *Haber,* 7 F. Supp. 790 (E.D.N.Y. 1934)], "Smith's Chevrolet Service" [*General Motors Corp.* v. *Smith, supra,* 138 U.S.P.Q. 382 (S.D. Cal. 1963)], "Fiat Sales and Service" [*Fiat Societa Per Azioni* v. *Vaughan, supra,* 7 Misc. 2d 4, 166 N.Y. Supp. 2d 39 (1957), *modified and aff'd,* 5 App. Div. 2d 821, 170 N.Y. Supp. 2d 627 (1st Dep't 1958)], "Dodge Service" [*Dodge Bros.* v. *East, supra,* 8 F. 2d 872 (E.D.N.Y. 1925)] and "Hoover Vacuum Cleaner Repairing" [*Hoover Co.* v. *Groger,* 12 Cal. App. 2d 417, 55 P. 2d 529 (1936)] have all been condemned as trademark infringement or unfair competition or both.

Nevertheless, the court below declared that plaintiff does not have the exclusive right to use of the wording "Volkswagen Service" or "VW Service" (CT 149). Apparently the court believed that others may employ this

term because it finds that unauthorized repair and service facilities have used such term extensively "at least in Southern California" so that it has come to mean "in the mind of the public in general only that the advertiser services Volkswagen vehicles" (CT 149-150).

We believe both of these supportive findings are clearly erroneous and that there is neither proof of extensive use by unauthorized garages of the term "Volkswagen Service" nor any local idiosyncrasy of meaning (pp. 60-63, *infra*). But, in any event, the court's conclusion that the exclusive right to the use of the wording "Volkswagen Service" or "VW Service" does not reside in plaintiff cannot stand in the face of its earlier findings that "Volkswagen" as a service mark belongs to plaintiff.

We are not concerned here with a mark peculiar to or localized in Southern California. On the contrary, "Volkswagen" is a mark with a nationwide, in fact, world wide, significance and reputation.

The court's findings establish that authorized Volkswagen service is advertised nationally as "Volkswagen Service" or "VW Service" (CT 142). There is no evidence that outside Southern California these expressions have any other significance than that the services so identified are performed under the aegis and control of plaintiff. The object in enacting the Lanham Act was to give trademarks nationwide protection. See *John R. Thompson Co.* v. *Holloway,* 366 F. 2d 108, 114-115 (5th Cir. 1966), and authorities there cited.

Automobile owners are necessarily mobile. The man who is in New York today may be in Colifornia next week. He cannot return to his own area for servicing. For that he must turn to a California enterprise. To him "Volkswagen Service" means service by plaintiff or under its aegis or control. Even if the court below were correct in thinking that residents of Southern California understand this term differently, tourists and travelers do not. Concern for them, as well as the interest of uniform, nationwide

protection, dictates that use of "Volkswagen" as a service mark should be confined exclusively to plaintiff and its licensees, in California as elsewhere.

In describing his services as "Volkswagen Service," defendant is employing plaintiff's service mark to identify, not to describe, his service. The fact that he precedes such identification with the word "independent" should no more legitimatize what he does than would adding the word "independent" before a trademark. Church could not sell an automobile part under the Volkswagen trademark, simply by adding the word "independent," *e.g.*, "Independent Volkswagen Windshield Wiper," "Independent Volkswagen Automobile Radio," etc. No more should he be permitted to represent his services as "Volkswagen" service through such device. As the court said of the far more explicit language in *Ford Motor Co.* v. *Helms, supra*, 25 F. Supp. 698, 699 (E.D.N.Y. 1938), the significance of "independent" "might well escape the attention of all but the most alert of intending customers."

(5) *"An Independent Volkswagen & Porsche Service Center"*

The error in the approach taken by the court below emerges most clearly in connection with its treatment of the advertisement which defendant has employed since 1962 in the local classified telephone directory (CT 96).

The advertisement is dominated by the legend "An Independent Volkswagen & Porsche Service Center" (CT 96). Only a shade less prominent is a silhouette of the most distinctive of Volkswagen vehicles, the well known "bug" or "beetle." Relegated to an insignificant place at the bottom is defendant's trade name "Modern Specialist" printed in lower case letters, generally reserved for purely descriptive material (*ibid.*). Centered in the advertisement is the phrase "Complete Stock Factory Parts."

But the court below finds nothing improper in this advertisement because it "adequately identifies the de-

fendant as independent of the plaintiff's organization, and does not give undue emphasis or prominence to the word 'Volkswagen' nor to the Volkswagen silhouette'' (CT 149).

But the advertisement must be approached as a whole. As Mr. Justice Holmes said, ''It is a fallacy to break the fagot stick by stick.'' *Schlitz Brewing Co.* v. *Houston Ice Co.*, 250 U.S. 28, 29 (1919).

The entire advertisement is impregnated ''with the drawing power of a congenial symbol.'' *Mishawaka Rubber & Woolen Mfg. Co.* v. *S. S. Kresge Co., supra,* 316 U.S. 203, 205 (1941). From top to bottom, apart from the unobtrusive reference to defendant's own trade name, the advertisement is designed to exploit the commercial magnetism inhering in the mark ''Volkswagen.'' Every individual element is calculated to reinforce the suggestion of identification with plaintiff. But, above all, ''Volkswagen'' is being used as a trade name and as a service mark. The ''center'' operated by Church is not a ''Volkswagen Center'' nor is it a ''center'' for ''Volkswagen Service.'' This is a misdescription and it is not saved by the addition of the word ''independent.'' The only ''Volkswagen Service'' is that rendered by plaintiff or under its aegis. Church does not provide ''Volkswagen Service''; he sells ''Church's Service.'' It is just as much a misnomer for him to represent himself as selling ''Independent Volkswagen Service'' as to claim that he sells ''Volkswagen Service.'' He does neither the one nor the other.

The public would be more likely to regard ''Volkswagen'' as being used to identify defendant's services because of the other elements in the advertisement. In trademark law pictures and words are interchangeable. *In re Dutch Maid Ice Cream Co.*, 95 F.2d 262, 263 (C.C.P.A. 1938). The well known silhouette of the Volkswagen vehicle is the pictorial equivalent of the word ''Volkswagen.'' This unique silhouette has been frequently featured in advertisements by members of the American

Volkswagen organization, as proved by Plaintiff's Exhibits 10f, 10t, 10v, 10cc, 10dd. Its use by franchised dealers in telephone and classified advertising is reflected in Defendant's Exhibits L-1 and O-4. Picture and text together interact in the reader's mind. Thus, in *Pan American World Airways* v. *Clipper Van Lines, Inc.*, 98 F. Supp. 524 (E.D.N.Y. 1951), use of the picture of an airplane reinforced the likelihood of confusion when an airline's trademark "Clipper" was used by a moving concern.

But there is still a third element present here, and that is the claim to "Complete Stock Factory Parts." Obviously, in the total context of this advertisement, the reader will perceive factory as a shorthand reference to the "Volkswagen factory." *

Thus a tourist or other potential customer for automobile services, turning to the telephone directory for assistance in locating a repair shop, sees an advertisement by a "Volkswagen Service Center" identified by the best known Volkswagen vehicle and proclaiming the availability of a complete stock of Volkswagen parts. Would any reader doubt that the place of business so identified and flaunting the symbols belonging exclusively to plaintiff is doing business under the "Volkswagen" mark and selling "Volkswagen Service"? How can this advertisement in its entirety, suggesting by word and picture complete identification with plaintiff, be deemed within defendant's limited license to advise the world that he is prepared to service Volkswagen vehicles? Would anyone coming upon this

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* The unfairness of defendant's claim to carry a complete stock of factory parts is aggravated by the fact that many of his parts do not have their source in the "factory," *i.e.*, plaintiff. Church obtains his parts from persons importing them from German sources (RT 626, 640). These parts have never had to pass through the exacting quality control to which plaintiff subjects the parts which it buys and distributes (P. Ex. 9e, Nelson, *Small Wonder, The Amazing Story of Volkswagen*, 218-219; P. Ex. 69L), and it is an imposition on the public to sell them as "Volkswagen Parts."

advertisement be likely to appreciate that, in fact, Church's business was totally unconnected with the enterprise whose product and mark dominated his advertisement?

As we develop at pp. 62-63, *infra,* the court below placed a weight on the use of the word "independent" which it will not bear. But where, as in the case of this telephone advertisement, defendant so far oversteps his right to use "Volkswagen" descriptively and uses it, as he does here, in the fashion of a trade name and as a service mark, then he infringes plaintiff's exclusive right to employ "Volkswagen" as a symbol, and he does not cure such infringement by adding "independent," any more than he would by prefacing it with "Church" (p. 30, *supra*).

The conclusion reached by the court below that none of defendant's practices, with the exception of the period when he formally used "Modern Volkswagen Porsche Service" as his trade name, "infringe any of the rights of plaintiff" and that "all of such practices have been in a denotive sense" (CT 151), is based upon too narrow a view of what the rights of plaintiff are. The word "Volkswagen" is not *publici juris.* On the contrary it is one of the world's best known marks. It owes the genuine acceptance it has received to the efforts plaintiff has made at all times to identify it with the best in products and services. These efforts have resulted in creating unusual drawing power for those services entitled to be sold under this mark.

Defendant's sole right to employ plaintiff's mark "Volkwagen" is as part of a simple statement of fact that he services vehicles of this manufacture. He is not operating a "Volkswagen Service Center" any more than the defendant in *Boone* was running a "Ford Auto Agency." *Ford Motor Co.* v. *Benjamin E. Boone, Inc., supra,* 244 Fed. 335 (9th Cir. 1917). In the half century which has elapsed since that case was decided, the tendency of the law of trademark infringement and unfair competition has been in the direction of enforcing increasingly higher standards of fair-

ness and commercial morality in trade. Restatement, Torts, Introductory Note (1938); Restatement (2d), Torts, Introductory Note (Tentative Draft No. 8, 1963). That defendant here did not duplicate exactly the conduct of the defendant in *Boone* is of no consequence. No case of trademark infringement is ever exactly like another. But the objective of both was the same: to appropriate for their own enterprises the commercial magnetism which the manufacturer had built up for his mark and name. Surely, "Volkswagen" is entitled to no less protection than this Court gave "Ford" half a century ago.

II.

Even if defendant used "Volkswagen" descriptively rather than as a tradename and service mark, the court below erred in concluding that he discharged the affirmative duty the law imposes to avoid confusion with authorized Volkswagen facilities.

For the reasons set forth in point I, defendant's employment of plaintiff's mark "Volkswagen" was consistently improper in that it was always used in the manner of a trade name or service mark and not simply in the one fashion in which it could properly be employed by defendant, which is to advise the world that he services cars identified by this mark. But even if defendant's use could be deemed within his "right to inform the public that he specializes in repairing Volkswagen cars" (CT 87), it would still be improper. This is because such right is accompanied by an affirmative obligation to avoid confusion, a "duty to explain." *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.*, 208 U.S. 554, 559 (1908). And the "explanation must accompany the use, so as to give the antidote with the bane." *Ibid.*

Even where another's mark is not used as a trademark or trade name, but is employed descriptively, it must be hedged around with qualifying language to ensure against

confusion with the product or services entitled to be identified by that mark. Handler and Pickett, *Trade-Marks and Trade Names, supra,* 30 Colum. L. Rev. 168, 188-189 (1930).

So, for example, in reselling a trademarked product after further manufacture, any reference to the original trademark must be made in such a fashion that even a "casual purchaser" could not be deceived. *Prestonettes, Inc.* v. *Coty, supra,* 264 U.S. 359 (1924); *Bourjois, Inc.* v. *Hermida Laboratories, Inc.,* 106 F.2d 174 (3d Cir. 1939); *Bulova Watch Co.* v. *Allerton Co.,* 328 F.2d 20, 23-24 (7th Cir. 1964); *R. B. Semler, Inc.* v. *Kirk,* 27 F. Supp. 630, 631-632 (E.D. Pa. 1938); *Bayer Co.* v. *Shoyer,* 27 F. Supp. 633, 635-636 (E.D. Pa. 1939); *B. B. & R. Knight* v. *W. L. Milner & Co.,* 283 Fed. 816, 819 (N.D. Ohio 1922).

Wherever there exists a license or privilege to use a term which has come to identify another's business or products and for which substantial goodwill has been created, as, for example, a descriptive or geographic term, or one which has become generic, reasonable precautions must be taken to avoid confusion with the product originally so identified. *American Waltham Watch Co.* v. *United States Watch Co., supra,* 173 Mass. 85, 53 N.E. 141, 142 (1899); *Singer Mfg. Co.* v. *June Mfg. Co.,* 163 U.S. 169 (1896); *Lane Bryant, Inc.* v. *Maternity Lane Ltd. of California,* 173 F.2d 559, 563-564 (9th Cir. 1949); *Brooks Brothers* v. *Brooks Clothing of California, Ltd.,* 60 F. Supp. 442, 452 (S.D. Cal. 1945) (dictum), *aff'd on the opinion below,* 158 F.2d 798 (9th Cir. 1947), *cert. denied,* 331 U.S. 824 (1947), and authorities there cited.

Similarly, although as a general proposition a person cannot be denied the right to use his own name in connection with his business,

> "where a personal name has become associated in the minds of the public with certain goods or a particular business, it is the duty of a person with the same or similar name, subsequently engaging

> in the same or similar business or dealing in like goods, to take such affirmative steps as may be necessary to prevent his goods or business from becoming confused with the goods or business of the established trader." *Horlick's Malted Milk Corp.* v. *Horluck's,* 59 F.2d 13, 15 (9th Cir. 1932).

Accord: *Thaddeus Davids Co.* v. *Davids Mfg. Co.,* 233 U.S. 461, 471-472 (1914); *L. E. Waterman Co.* v. *Modern Pen Co.,* 235 U.S. 88, 94 (1914); *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co., supra,* 208 U.S. 554, 559-560 (1908); *Henderson* v. *Peter Henderson & Co.,* 9 F.2d 787 (7th Cir. 1925).

Thus, the defendant in *Ford Motor Co.* v. *Helms, supra,* 25 F. Supp. 698 (E.D.N.Y. 1938), could only employ "Ford" in a sign coupled with the disclaimer "We do not act as authorized dealers, or conduct a Ford authorized service station," and then only if the letters in the disclaimer were "as large and as visible at all times as any other letters appearing upon the sign."

But the court below applied a far less exigent test to defendant's conduct. Instead of determining whether defendant had discharged his affirmative obligation to avoid confusion, *i.e.,* whether each time he employed plaintiff's mark "Volkswagen" he had qualified and explained such use, the court below deemed it sufficient if defendant, in informing the public that he repairs Volkswagen cars, does not "do so in such a manner as to mislead the public into believing that he is part of the plaintiff's organization" (CT 87). This suggests that if defendant has done nothing affirmatively misleading, he has met the law's requirements, whereas what is required is positive action to avoid confusion.

The significance of this error is reflected in the false importance both defendant and the court below gave to what defendant had not done. Contesting plaintiff's claim that he had invaded its rights in the word "Volkswagen," defendant stressed his forbearance from using its other

trademarks or imitating the trade dress of its licensees (CT 89). And the court below, when it wrote its decision, agreed "that he adequately distinguishes his business from the plaintiff's organization, by giving reasonable prominence to the word 'Independent', and by not using the plaintiff's encircled VW symbol nor plaintiff's distinctive colors or style of printing" (*ibid.*).

Since the issue here was whether or not plaintiff's service mark "Volkswagen" had been infringed, it was "immaterial and irrelevant" that defendant had refrained from infringing some other mark or engaging in another species of unfair competition. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 314 F.2d 149, 161 (9th Cir. 1963), *cert. denied,* 374 U.S. 830 (1963); *Sierra Chemical Co.* v. *Berettini,* 33 F.2d 397, 399 (7th Cir. 1929); *American Distilling Co.* v. *Bellows & Co., supra,* 102 Cal. App.2d 8, 26, 226 P.2d 751, 762 (1951).

Underlining the court's error is the fact that the record and its own findings show that confusion between defendant's business and authorized Volkswagen dealers generated by his abuse of plaintiff's mark "Volkswagen" is in no way avoided by the fact that he does not reproduce this mark in plaintiff's distinctive colors, blue and white, or style of lettering, Memphis Bold, or couple it with the encircled "VW" emblem. Older Volkswagen dealerships are not "distinguishable by their mere physical facilities, size, style or coloring of lettering, from the establishments of unfranchised businesses dealing with the sale or repair of Volkswagens" (CT 143-144). Thus, both as a matter of law and in the context of this record, all that defendant can point to as discharging his duty to avoid confusion in his employment of plaintiff's mark "Volkswagen" is what prominence, if any, he has given to the word "independent" in conjunction therewith.

When the court below came to write its findings, it virtually acknowledged as much. Although it made a separate finding that defendant "has not attempted to give the

appearance or impression that his business is part of plaintiff's organization" (CT 150), when the court dealt directly with his use of the word "Volkswagen," it said nothing about colors or style of lettering. It pointed solely to his use of the word "independent" as discharging his duty to avoid confusion in his use of the mark for which plaintiff has built up so much goodwill.

> "In connection with the use by defendant of the phrase 'Volkswagen Service', the letters 'VW', and the use of the silhouette of the most widely known Volkswagen vehicle, the defendant has adequately distinguished his business from the plaintiff's organization by the used of the word 'Independent' " (CT 148).

The court below erred both factually and legally. First, as we develop at greater length later at pp. 67-68, *infra,* until the complaint herein was filed the word "independent" did not qualify "Volkswagen" where it counted most, that is, on defendant's signs and invoices. That it may have appeared on some promotional item or on a business card, which may or may not have been seen by the persons attracted by the signs or receiving the invoice, certainly cannot be considered giving "the antidote with the bane." *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co., supra,* 208 U.S. at 559.

Second, the ambiguous word "independent," with its multiple meanings, when coupled with the balance of defendant's conduct, in no way satisfies his obligation to take positive steps to prevent confusion.

In evaluating whether confusion will result, the test is the likely impact upon "ordinary purchasers, buying under the usual conditions prevailing in the trade, and giving such attention as such purchasers usually give in buying that class of goods." *Queen Manufacturing Co.* v. *Isaac Ginsberg & Bros., Inc.,* 25 F.2d 284, 287 (8th Cir. 1928); *Tillman & Bendel, Inc.* v. *California Packing Corp.,* 63 F.2d 498, 509 (9th Cir. 1933), *cert. denied,* 290 U.S. 638 (1933);

G. Heileman Brewing Co. v. *Independent Brewing Co.,* 191 Fed. 489 (9th Cir. 1911).

Protection must be given not only to the careful and prudent buyer but also to the "ignorant, the inexperienced, and the gullible." *Stork Restaurant, Inc.* v. *Sahati,* 166 F.2d 348, 359 (9th Cir. 1948); *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* 314 F.2d 149, 156 (9th Cir. 1963), *cert. denied,* 374 U.S. 830 (1963); *Florence Mfg. Co.* v. *J. C. Dowd & Co.,* 178 Fed. 73, 75 (2d Cir. 1910). Accordingly, very explicit and unequivocal disclaimers must accompany use of another's valuable trademarks or other positive steps must be taken to avoid confusion. *Prestonettes, Inc.* v. *Coty, supra,* 264 U.S. 359 (1924); *Bulova Watch Co.* v. *Allerton Co., supra,* 328 F.2d 20, 21, 24 (7th Cir. 1964), *reversing,* 216 F. Supp. 875 (E.D. Ill. 1963); *Bayer Co.* v. *Shoyer, supra,* 27 F. Supp. 633, 638 (E.D. Pa. 1939).

Thus in *Bourjois, Inc.* v. *Hermida Laboratories, Inc., supra,* 106 F.2d 174, 175 (3d Cir. 1939), which involved the proper labeling of repackaged cosmetics to avoid unfair competition, the Third Circuit disapproved as insufficiently informative the following label: "Bourjois—Evening in Paris—Face Powder—Repacked by Hermida Laboratories —Wholly Independent of Bourjois."

In *Horlick's Malted Milk Corp.* v. *Horluck's, supra,* 59 F. 2d 13, 16 (9th Cir. 1932), this Court held that defendant had not discharged his duty to avoid the confusion with "Horlick's Malted Milk" arising from the use of his surname "Horluck" in connection with several stores operated as "Horluck's Malted Milk Shops" by referring in his advertising and in its promotional circulars to the "local character of its organization." This Court agreed that the defendant should be enjoined

> "from using the name 'Horluck's' in the possessive, i.e., 'Horluck's,' or in the plural, i.e., 'Horlucks,' in connection with the sale of malted milk. The use of the possessive is one of the most objectionable features of defendant's practices, inasmuch as it is the

> possessive 'Horlick's' with which plaintiff's product is associated in the mind of the public. This will still leave the defendant free to use its name in connection with its business in any lawful way and is in conformity with the decided cases, giving both the plaintiff and defendant ample protection of their respective rights." 59 F.2d at 16.

Similarly here, "Volkswagen Service" is the term with which plaintiff's service is associated in the mind of the public. How is the conundrum resulting from defendant's addition of the adjective "independent" before this phrase compatible with his obligation to employ terminology incapable of being misunderstood? "Independent Volkswagen Service" requires the public to balance the claim that Church renders "Volkswagen Service" against his description of it as "independent." But, as this Circuit has noted, "The usual purchaser neither abstracts nor analyzes for the purpose of differentiation and judgment." *G. Heileman Brewing Co.* v. *Independent Brewing Co., supra,* 191 Fed. 489, 497 (9th Cir. 1911).

It is not self-evident that defendant's phraseology is designed to confuse the public and yet give him some basis for arguing to jurists, trained by their profession to abstract and analyze, that such confusion is unlikely?

In this so far he has been successful. The court below has accepted his argument that prefacing "Volkswagen Service" with the word "independent" avoids confusion. It rests such conclusion on its finding that "[t]he word 'Independent' has, through widespread practice not confined to the Volkswagen line of manufactured products, for many years, at least in Southern California, gained a significance indicating that the advertiser using that word is not 'Enfranchised' or 'Authorized,' by the manufacturer of the product, or by an authorized representative thereof, to sell or service its product" (CT 144).

But the court did not find, nor could it find, that in Southern California anymore than elsewhere in the United States this is the sole significance this word has, nor

even the meaning which first comes to mind. The same dictionaries are used in Southern California as elsewhere; the same history of the "Declaration of Independence" is taught.

"Independent" is a word which takes its meaning from its surroundings. Just as defendant uses it allegedly to distinguish himself from franchised operations, so equally is it employed elsewhere to mark off franchised businesses, of exactly the character of the Volkswagen network, from manufacturer-owned outlets (*e.g.*, RT 703). So, for example, a federal judge wrote:

> "The franchise system creates a class of *independent* businessmen; it provides the public with an opportunity to get a uniform product at numerous points of sale from small *independent* contractors, rather than from employees of a vast chain." *

This is the same connotation as the word carries in the Volkswagen franchise agreements themselves which place the task of providing consumer service upon "*independently* owned enterprises" (P. Ex. 6e, p. 1) (emphasis added). It is no answer, as the court below seems to believe, that authorized dealers are not "independent" within the meaning of this term when used to signify, not the entrepreneurial role of the business, but its connection with the manufacturer of the product upon which it is based (CT 144). One usage is as legitimate as the other. How is the passing motorist to choose among them? Even if to a resident of Southern California one significance may be more obvious than another, this is not true of the tourists who yearly flock to Long Beach where Church is located. How is a tourist to appreciate the special significance that inheres in "Independent Volkswagen Service" in contradistinction to "Reliable Volkswagen

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* *Susser* v. *Carvel Corp.*, 206 F. Supp. 636, 640 (S.D.N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965) (emphasis added).

Service" or "Modern Volkswagen Service"? How is he to know that "independent," unlike "modern" or "reliable," does not describe the kind of "service" but rather qualifies the claim to render "Volkswagen Service"?

The court below unequivocally condemned "Modern Volkswagen Porsche Service" as use of "Volkswagen" in a proprietary sense (CT 151). Why is "Independent Volkswagen Porsche Service" any different? To most members of the public "modern" and "independent" are laudatory words of the same character, meaningless prefixes, totally without significance.

The obligation the law imposes is to make clear and unambiguous the lack of connection otherwise arising from the use of the trademark. It is not discharged by equivocal terminology as consistent with authorization as not.

Plaintiff has not demanded any elaborate disclaimer of connection. It has not asked unauthorized facilities like Church to burden their signs or advertising with elaborate phraseology of the kind the courts have deemed proper in other circumstances. All that it requires is that they not employ the terminology associated in the public mind with franchised facilities, "Volkswagen Service" or "VW Service." The information which defendant is entitled to communicate is all contained within the phrases "Repairs for Volkswagen Vehicles" or "Service for Volkswagen Vehicles."

If Church deliberately eschews such language, if for six years he has insisted upon using instead "Volkswagen * * * Service," it is because the latter phrase is not synonymous in the public mind with "Service for Volkswagen Vehicles." "Volkswagen Service" carries a symbolic significance in the market place extending beyond its literal meaning. It owes this to its identification with plaintiff and its licensees.

When Church elected to describe his services by the term "Volkswagen Service," he breached his duty to avoid confusion in his use of plaintiff's mark "Volkswagen." Even if "independent" means, among other things, one

not connected with the manufacturer, the term "Independent Volkswagen Service" breeds confusion which can readily be avoided. Accordingly, the court below erred in deeming that defendant conformed with the requirements which the law imposes.

III.

Numerous statements in the formal findings and conclusions filed below are erroneous.

The facts which plaintiff deems basic to this litigation are not in dispute. However, plaintiff does take issue with numerous inferences and conclusions drawn from these facts. Although many of them are included in the court's formal findings of fact, they are not covered by the clearly erroneous rule either because they resemble more nearly conclusions of law or because they involve some incorrect legal standard.

None are necessarily critical to plaintiff's position in this appeal but should such appeal prove unsuccessful their perpetuation uncorrected would encourage wholesale trademark infringement and unfair competition.

A.

The meaning of "Volkswagen Service" in Southern California.

In Finding No. 35 the court below states that in Southern California, because repair and service facilities for Volkswagen vehicles have made extensive use of "Volkswagen Service" or "VW Service," such terminology "has come to mean in the mind of the public in general only that the advertiser services Volkswagen vehicles" (CT 149-150).

There is no evidence of "extensive use." There is evidence that in 1961 or 1962 one, or perhaps two, unauthorized facilities used the wording "Volkswagen Service"

(D. Ex. O2). There is also evidence that four other enterprises besides defendant have used some variant of "An Independent Volkswagen Service Center" in their advertising, and that two of these have done so on their signs as well (D. Exs. O1, O5, O8, O11, O13, P-T). But five concerns clearly do not form any significant fraction of the service facilities available in Southern California. Moreover, two or more of these firms are currently engaged in litigation with plaintiff revolving around the use of its marks (RT 964-972, 974-975).

Furthermore, there is no evidence that use by one or two non-franchised businesses of the term "Volkswagen Service" or "VW Service" has changed the meaning of these terms from what it is everywhere else, which is that the facilities so identified are part of the authorized Volkswagen network.

Significantly, although defendant called numerous consumer witnesses, he was very careful never to ask them what the term "Volkswagen Service" meant to them. Without exception, the inquiry put to them was what a phrase such as "Independent Volkswagen & Porsche Service" conveyed to them regarding the business it identified (RT 460-462, 535-541, 547-551, 555-558, 571-573, 589-593, 629-632).

But while there is no evidence in the record to support the court's finding regarding the ambiguity of the phrase "Volkswagen Service," there is a great deal of evidence in the record that this is the term employed by plaintiff and by members of the authorized Volkswagen organization throughout the United States to identify services offered under the aegis and control of plaintiff (P. Exs. 7, 10aa, 10dd, 10ee, 69e, 69i, D. Ex. A2). And the court so found (CT 142).

This promotional material and national advertising circulates in Southern California as well as in the rest of the country. Accordingly, the court clearly erred in finding that "Volkswagen Service" means any garage willing to repair Volkswagen vehicles.

B.

The use of "independent" and "authorized" in Southern California.

The court makes a number of findings regarding the significance of the words "authorized" and "independent" and their use in Southern California by repair facilities for Volkswagen vehicles (CT 144). The impression created is that in this area of the country the words "authorized" and "independent" are used and relied on by service facilities and the public alike to distinguish authorized from unauthorized service facilities. This is not the case and the record does not so show.

The photographs of authorized repair facilities put into evidence show that they almost never use the word "authorized" in the signs on their premises identifying their premises to the public (RT 600; P. Exs. 69a-69g, 70c, 70f, D. Exs. A1-A5). That word is used with some frequency only in telephone and newspaper advertising (D. Exs. L1-L7, O5, O13). Even here the practice is not uniform since the parts and service advertisements recommended by VWoA for dealer's use in newspaper and other local media refer in their text simply to "VW Service" or to a "Volkswagen dealer" (P. Ex. 10d, pp. 63-64).

It is mainly in connection with off-premises advertising and on business forms that such phrases as "Authorized Dealer," "Authorized Volkswagen Service" and "Authorized Service" are employed. But there is no consistency in this regard. Thus, while many dealers use the words "Authorized VW Sales-Service-Parts" on their repair order forms, not all do (P. Ex. 69j; RT 250-251).

In connection with the word "independent," defendant produced evidence of only two garages servicing Volkswagen vehicles besides his own which use the word "independent" on their on-premises signs and on their trucks: Karl's Garage (D. Ex. P) and German Motors (D. Exs. Q-T). Both are involved in controversy with plaintiff (RT 969-970, 975). These two concerns, plus two more,

also employ "independent" in their advertising (D. Exs. O1, O5, O8, O11, O13).

Although elaborate evidence went into the record regarding the "Independent Garage Owners Association of California" (RT 668-706, D. Exs. V1-V5, O3, 06, O9), there was no evidence that any repair shop servicing Volkswagen vehicles was a member of this organization or displayed its insignia.

Seven witnesses were also called as representative of three hundred more (RT 665-666, 1111-1112) and asked to define "independent" (RT 460-462, 535, 554-555, 570, 588-589, 629). Of the seven, two were engaged in business directly hostile to the authorized Volkswagen organization. Outside the established distribution, one was importing Volkswagen cars (RT 446-447) and the other, parts (RT 636-640). Of the balance, all except one were longtime customers of Church.

Giving full credence to their testimony, nevertheless, it established at most that one significance of the term "independent" is, as the court found, not "Enfranchised" (CT 144), but this is a very different thing from proof of a "growing practice, at least in Southern California, among a substantial number of businesses that service Volkswagen vehicles to identify those that are not part of plaintiff's organization of dealers, by use of the word 'Independent' " (CT 144). Regarding this, as we have already noted, defendant established no more than that four other concerns servicing Volkswagen vehicles, in addition to himself, have employed "independent" as part of their business identification, and two or more of these are involved in litigation with plaintiff.

Thus the record fails to show that Volkswagen owners in Southern California recognize that "independent" in conjunction with the word "Volkswagen" means that the business displaying these signs is not part of the Volkswagen organization even though doing business under the Volkswagen trademarks.

C.

Defendant's persistence in his tortious conduct.

Although the detailed findings made by the court below demonstrate that defendant only ceased his most flagrant misconduct when the complaint herein was filed, the court finds that he "made reasonable efforts to accommodate the plaintiff and to adjust his advertising to meet the plaintiff's objections" (CT 148). The evidence regarding "Modern Volkswagen Porsche Service" alone shows that this finding is not consistent with the facts. Although defendant conceded, and the court below agreed, that this name was improper, as the court's findings recite, even after he "formally altered his trade name to 'Modern Specialist' he continued to use his former appellation prominently in his business" (CT 146).

Still another example of defendant's unreasonableness is his obdurate refusal to change his repair order form while simultaneously inviting plaintiff to litigate the issue (P. Ex. 54).

For similar reasons, plaintiff takes issue with the court's finding that defendant "has carefully avoided using advertising which would give the appearance or impression to the public that his business is part of plaintiff's organization" (CT 150). What better way is there of doing so than by using the marks which identify plaintiff's organization to the world? There is, in fact, no other way of establishing a connection. Not all blue and white buildings house franchised Volkswagen dealers, nor is Memphis Bold lettering exclusive to them; but, without exception, they display plaintiff's trademarks.

D.

Defendant's blue and white promotional material.

VWoA has suggested to authorized dealers that as a goodwill device they give customers a hand towel or napkin to wipe up any leftover oil or dirt (P. 69i; RT 247-248).

Church uses as a promotional device a napkin which is a duplicate of those employed by authorized Volkswagen service centers except for the omission from it of a little mannequin built around the encircled "VW" emblem and the Porsche trademark. Defendant's towel, like that sponsored by VWoA, is white and its lettering, blue (P. Ex. 24).

In Finding No. 34 the court distinguishes the two on the ground that the color of the lettering is "unlike the lighter shade of blue that plaintiff has adopted as part of its commercial signature" and the lettering itself is not in the "style adopted by the plaintiff for its dealers" (CT 149).

There is no evidence that plaintiff and its licensees confine themselves to any specific shade of blue. And even if the blue used were uniform—which it scarcely could be since no color used on paper, metal, plastic and cloth is always the same—no consumer could be expected to carry a specific shade in mind. Equally the record undermines the implication that the lettering on Church's napkin is different from that used by authorized Volkswagen dealers.

Comparison of the napkin employed by Church (P. Ex. 24) with those used by authorized Volkswagen dealers (P. Ex. 69i) will show that, in fact, all employ the same type face. The elaborate "Memphis Bold" style is generally not employed by the authorized Volkswagen organization for advertising and promotional material.

E.

Use of blue and white and "Memphis Bold" lettering by non-franchised repair shops.

At the trial defendant took the position that he distinguished his facilities by his failure to duplicate the colors or lettering most closely associated with authorized Volkswagen facilities. The premise implicit in this argument was that coloring and lettering are so closely identified with plaintiff that simply eschewing both would

put the public on notice that this was not an authorized facility. In its opinion the court below apparently accepted this view, agreeing with defendant that he "adequately distinguishes his business from the plaintiff's organization * * * by not using * * * plaintiff's distinctive colors or style of printing" (CT 89).

After the decision was written plaintiff persuaded the court that it was not true that an authorized Volkswagen dealer could always be singled out by its color or style of lettering. This did not, however, mean that imitation of coloring or lettering would not be an aggravating circumstance, increasing the likelihood of confusion, where it existed. All plaintiff was seeking to do was to demonstrate to the court that their absence was not critical, as the court had deemed it.

But when the court came to write its conclusions of law it fell into an error directly the opposite of its previous one. It now took the position that plaintiff's distinctive colors and lettering were open to use by the world at large.

> "The plaintiff in the instant case does not have the exclusive right to the blue and white color combinations, nor to Memphis Bold style of print, etc., but the use of such color combinations and style of print must be used by the independent facility in such an environment and in such a manner that such use will not be likely to lead to public deception" (CT 151-152).

The statement is a contradiction in terms. Any use by an independent facility, by which the court clearly means one not authorized by plaintiff, of the distinctive colors or distinctive style of lettering employed by plaintiff will most certainly lead to public deception. What justification can there be for any unauthorized facility selecting, from all the colors that exist and all the styles of lettering that are available, precisely those which mark plaintiff and its franchisees? We trust that the Court, whatever disposition it makes of this case, will correct this error.

IV.

Since under any test defendant's conduct was wrongful until litigation began, it was error to dismiss plaintiff's complaint and leave defendant free to renew his tortious practices.

A.

Not until after suit was brought did Church cease using "Volkswagen" unqualified by "independent."

Until plaintiff turned to the courts for relief against Church's use of its trademarks to identify his business and service, nothing whatever on his repair order forms or on the signs on his premises, not even the ambiguous word "independent," purported to give notice that he was not connected with plaintiff (pp. 12-16, *supra*). A motorist attracted to his premises by its exterior appearance could have patronized it indefinitely without ever learning that it was not the authorized facility its use of plaintiff's trademarks suggested it to be.

A tourist visiting the Long Beach area who happened to drive by Church's garage would have seen a building identified on its facade as "Modern Volkswagen Porsche Service." He would have observed on the pole sign in front of the premises a sign-board reading simply "Volkswagen" (CT 147).

Nothing anywhere on any of the signs would have alerted him to the fact that the "Volkswagen Service" offered within was not the "Volkswagen Service" nationally advertised and known to him at home.

Had the passing motorist been induced by the appearance of defendant's premises to patronize defendant in the belief that he was dealing with a member of the authorized Volkswagen organization, the repair order which he received would in no way have disabused him. It, too, read simply "Volkswagen & Porsche Service" (CT 147).

Thus, a customer who had no occasion to consult the telephone book and did not happen to receive a business

card or any of the promotional material used by Church could have patronized him right up to the time this proceeding started without seeing the word "independent" used in connection with the word "Volkswagen."

As appears from the findings below, defendant has been as slow to adopt the word "independent" in connection with his business as he has been to abandon "Modern Volkswagen Porsche Service." The first appearance of the word "independent" in connection with defendant's business was its use some time subsequent to 1960 on his business card where it initially appeared in tiny, inconspicuous letters (P. Ex. 19b). In 1962 it was introduced into his telephone advertising (P. Ex. 11e) and in 1963 it was placed on his truck (P. Ex. 59) and incorporated in the legend on various give-aways (P. Exs. 21, 22, 24-26; RT 893-898). But not until defendant received the complaint in this proceeding did he include it on his on-premises signs (CT 147) or his repair order form (CT 148).

Thus, even under the trial court's view of the facts and the law, only the compulsion of this litigation resulted in respect for plaintiff's rights. Until then, defendant's use of plaintiff's mark "Volkswagen" on his signs was accompanied by no disclaimer or qualification. Even, therefore, if the court below were correct in its view that use of the word "independent" in connection with the phrase "Volkswagen Service" adequately distinguishes defendant's business from plaintiff's organization, this is not how "Volkswagen Service" was qualified when plaintiff filed its complaint.

B.

Because recurrent infringement is a daily hazard, an injunction should have issued to vindicate and protect plaintiff for the future.

Although the court's own findings establish that defendant's conduct prior to the filing of its complaint herein invaded plaintiff's rights, the court dismissed plaintiff's complaint, declaring that defendant's previous practices "were not indulged in by the defendant with any belief on his

part that the same constituted a violation of plaintiff's rights or constituted unfair competition and are not intended in the future to be indulged in by the defendant" (CT 145).

Even if both these statements found support in the record, which they do not, neither justifies denial of injunctive relief. The test of the necessity for injunctive relief is the likelihood of recurrence, not defendant's good faith or subjective intent.

(1) *Good faith and future intent are not controlling.*

To establish trademark infringements under federal law, it is unnecessary to show "wrongful intent." *Thaddeus Davids Co.* v. *Davids Mfg. Co., supra,* 233 U.S. 461, 471 (1914); *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* 314 F.2d 149, 157-158 (9th Cir. 1963), *cert. denied,* 374 U.S. 830 (1963). California law is in accord. *Stork Restaurant* v. *Sahati, supra,* 166 F.2d 348, 360-361 (9th Cir. 1948); *Lane-Bryant Inc.* v. *Maternity Lane Ltd. of California, supra,* 173 F.2d 559 (9th Cir. 1949).

Similarly, that a defendant intends, or even promises, not to repeat acts of trademark infringement does not strip the wronged party of his right to better assurances against repetition. *Wesson* v. *Galef*, 286 Fed. 621, 626 (S.D.N.Y. 1922); *Blisscraft of Hollywood* v. *United Plastics Co.*, 294 F.2d 694, 702 (2d Cir. 1961). See also *Juvenile Shoe Co.* v. *Federal Trade Comm'n,* 289 Fed. 57, 59-60 (9th Cir. 1923), *cert. denied*, 263 U.S. 705 (1923).

> "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States* v. *Oregon State Medical Soc'y*, 343 U.S. 326, 333 (1952).

(2) *Defendant's good faith and future intent are very dubious.*

But, in fact, the court's view that defendant acted in good faith and that he has no intent to resume his

invasion of plaintiff's rights finds little support in the record. Contrary conclusions could more easily be reached.

Since at least 1959, defendant has known that use of the phrase "Modern Volkswagen Porsche Service" to identify his premises is improper and that he is under an obligation in using plaintiff's mark "Volkswagen" to make it clear that he is not using it, as do authorized Volkswagen facilities, to identify his premises. In that year he promised through his attorneys that "his next telephone listing, letterheads, invoices and business cards will make it clear that his firm is independent of the Volkswagen organization" (P. Ex. 30).

Yet, nine months later, investigations disclosed that defendant was still doing business under the name "Modern Volkswagen Porsche Service" (P. Ex. 36) and, in fact, this continued to constitute the principal identification on his building until this proceeding was brought (CT 146). Never has he carried out his 1959 promise which bound him only to do what the law requires.

The changes Church made in his signs and stationery when plaintiff finally resorted to the courts also reflect unfavorably on his good faith. If defendant really believed his conduct prior to the initiation of this litigation was proper, why did he so hastily abandon it when the matter was submitted to the courts for resolution?

There is even less basis in the record for the court's finding that defendant does not intend in the future to indulge in the practices he was engaged in when the complaint herein was filed. Nothing he has said at any time demonstrates an intention to do in the future otherwise than he has in the past. At no time has he conceded any impropriety in his past conduct since change of his trade name in 1959 to "Modern Specialist." Far from conceding any right in plaintiff to protection of its marks, he disputes their validity (pp. 18-19, *supra*).

Nor has his attorney made any such promise on his behalf. On the contrary, if we properly understand his counsel's position, it is that Church is well within his

rights in using the phrase "Volkswagen & Porsche Service" without the word "independent," just as he was doing before the litigation commenced. This was also Church's position at the trial (RT 1017-1018).

(3) *Dismissal of the complaint vindicates defendant and invites renewed invasion of plaintiff's goodwill.*

Even under the limited view of plaintiff's rights taken by the court below, this is not a case of inadvertent and short-lived infringement quickly brought to an end and which there is no likelihood will recur. Here, the incursions on plaintiff's goodwill antedated the complaint by a good five years; these infringements were persisted in despite plaintiff's objections and under cover of promises to discontinue; and they came to an end only when judicial relief seemed imminent.

Because of the type of trademark infringement here involved, delineation of plaintiff's rights and of defendant's affirmative obligations is peculiarly necessary. Unlike the usual case of trademark infringement, where the defendant clears himself of misconduct simply by abandoning use of the infringing mark, Church, here, is continuing to use, and daily will be using, plaintiff's marks on his signs, in his advertising and on his stationery. Trademark infringement thus remains a constant hazard.

Moreover, the situation is one in which there is always present the temptation to poach upon the goodwill built up for the businesses and services identified by these marks. Such temptation may well prove as irresistible as it has in the past if this litigation ends in what appears to be complete vindication for defendant.

The Restatement of Torts, section 744, quoted with approval by this Court in *Stork Restaurant, Inc.*, v. *Sahati, supra,* 166 F.2d 348, 362 (9th Cir. 1948), notes that an injunction properly issues "[a]s a means of establishing and vindicating the plaintiff's right * * * even though the defendant ceases his improper conduct."

> "Thus, if the defendant disputes the plaintiff's right, an injunction is proper, despite the cessation of the infringing conduct, in order to adjudicate the wrongful quality of that conduct and to protect the plaintiff against its resumption, which, in view of the dispute, may be likely. Similarly, if the defendant engages in his conduct with knowledge of the plaintiff's interest, cessation of the conduct upon notice from the plaintiff or upon the bringing of the action does not make an injunction unnecessary, for resumption of the conduct thereafter is not unlikely."

Vindication of plaintiff's right is peculiarly imperative in view of the fact that Church made it plain through his counsel that he would not respect plaintiff's right in its mark without such vindication. In 1962 he refused in any way to qualify his claim on his repair order form to sell "Volkswagen & Porsche Service" and told plaintiff to go to court for relief (P. Ex. 54).

The active part taken by Church shortly after the complaint herein was filed in the formation of an organization of workshops, like himself, for the purpose of securing recognition of their use of plaintiff's trademarks (RT 1019-1024, 1040-1041) shows that when Church threw down the gauntlet and challenged plaintiff's right to protect its trademarks, he was acting with considerable deliberation and presumably in the expectation of support from others like himself.

Members of this larger group can only be encouraged in the use of plaintiff's trademarks in a misleading and ambiguous fashion if it appears that all they need do to defeat any right in plaintiff to relief is to abandon their most egregious misconduct after a complaint is filed.

The time of the courts will be taken up with repetitious and unproductive proceedings in the absence of any definitive declaration of rights.

Plaintiff is not asking the Court in any way to interfere with Church's right to tell the public that he services

Volkswagen cars. It is asking for a shield, not a sword. It is not seeking to have Church "mulcted in damages" nor "to drive [him] out of business." *Stork Restaurant, Inc.* v. *Sahati, supra,* 166 F.2d 348, 364 (9th Cir. 1948). It prays merely that he be compelled to desist from doing business under its banner.

C.

Injunctive relief will serve public interest and safety.

Any case of trademark infringement and unfair competition affects not only the parties immediately concerned, but also the public. In fact, one of the purposes intended to be served by the Lanham Act "is to protect the public so it may be confident that, in purchasing a product bearing a particular trademark which it favorably knows, it will get the product which it asks for and wants to get." S. Rep. No. 1333, 79th Cong., 2d Sess., 3 (1946).

But the public interest is peculiarly strong where automobiles are involved. Fifty years ago, this Court pointed out some of the reasons why it is important to a consumer to buy his car from an authorized representative of its manufacturer:

> "The purchase of an automobile is not like the purchase of a sack of potatoes. An automobile is a complex mechanism, designed to be used for an indefinite length of time. Parts wear out and must be replaced. The ordinary purchaser realizes that he is incompetent to judge whether in all respects an offered car is up to the manufacturer's advertised standard. It is a consideration of some importance to him to be able to deal with the maker or its recognized agent. He desires the assurance that the article he purchases is standard; that it has the maker's guaranty; that he will be able to procure parts and accessories as he may need them; and, of course, that no question will be raised touching his title." *Ford Motor Co.* v. *Benjamin E. Boone, Inc., supra,* 244 Fed. at 338.

Parallel, and perhaps even stronger, reasons make it a consideration of some importance to the motorist whether the service station to which he takes his car for repair operates under the aegis and control of the original manufacturer.

If the average purchaser is incapable of judging whether a car's performance is up to standard, he is totally at sea regarding the competency and adequacy of service performed outside his presence upon a complex mechanism. Yet more than his pocketbook may be involved. His very life may depend upon the care with which the work is done. Defective repairs can be fully as lethal as defective manufacture.

Fully aware of the hazards involved in improper service, many a motorist desires to do business only where he can be certain that the original manufacturer has trained the men working on his car, provides and guarantees the parts used in its repair and supervises the quality of the service done. If he is duped by misleading signs into patronizing a place in which he enjoys none of this protection he has been vitally prejudiced.

As this Court can take judicial notice, thousands of motorists from all parts of the United States visit California each year. It may be that the service and repair work done by Church is in all respect the equal of that done under plaintiff's supervision and that the parts he buys are just as reliable. But the fact remains that he employs mechanics who have not received the training plaintiff deems essential; he uses repair parts which have not passed its quality control; and the work he does is unsupervised.

The judgment entered below will encourage him, and the hundreds of other garages like his, to try to pass themselves off on the touring stranger as authorized facilities by all the devices which now appear to have judicial approval: lavish display of claims of "Volkswagen Service"; imitation of the color combination, blue and white, and the lettering, "Memphis Bold," associated with plaintiff; use

of "Volkswagen" on business signs in a fashion similar to a trade name; and generous featuring of pictures of plaintiff's best known product, the small sedan.

Plaintiff's goodwill and reputation will necessarily suffer. But, what is equally important, the public at large, including the stranger touring California, will be defrauded.

At the very least, the practices in which defendant engaged until litigation began should have been enjoined. This is necessary to discourage their resumption by defendant and their imitation by others. But complete protection of the public requires more. For the public to be able to rely in the future, as it has in the past, upon the meaning of the word "Volkswagen" when used in connection with a garage, the exclusive right to its use as a trade name, trademark and service mark must be restored to the authorized Volkswagen organization. This means that defendant should be enjoined from using that word as he is now doing and should be confined to employing it solely in a descriptive way to advise the public that he stands ready to repair Volkswagen vehicles.

CONCLUSION

For the foregoing reasons, Volkswagenwerk Aktiengesellschaft respectfully requests this Court to reverse the judgment entered below and to remand the case to the lower court with directions to grant plaintiff the injunction prayed for in the complaint.

November, 1967.

Respectfully submitted,

Lawler, Felix & Hall,
Leslie C. Tupper,

Herzfeld & Rubin,
Walter Herzfeld,
Cecelia H. Goetz,

Attorneys for Appellant.

Appendix A

Article 10bis

(1) The countries of the Union are bound to assure to persons entitled to the benefits of the Union effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities of a competitor;
2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities of a competitor;
3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of the goods.

Article 10ter

(1) The countries of the Union undertake to assure to nationals of the other countries of the Union appropriate legal remedies to repress effectively all the acts referred to in Articles 9, 10 and 10bis.

* * *

The relevant provisions of the Trademark Act of 1946, 60 Stat. 437 (1946), as amended, 15 U.S.C., sections 1051 *et seq.*, are as follows:

15 U.S.C., section 1065:

Except on a ground for which application to cancel may be filed at any time under subsections (c) and (e) of section

1064 of this title, and except to the extent, if any, to which the use of a mark registered on the principal register infringes a valid right acquired under the law of any State or Territory by use of a mark or trade name continuing from a date prior to the date of the publication under this chapter of such registered mark, the right of the registrant to use such registered mark in commerce for the goods or services on or in connection with which such registered mark has been in continuous use for five consecutive years subsequent to the date of such registration and is still in use in commerce, shall be incontestable: *Provided,* That—

* * *

(3) an affidavit is filed with the Commissioner within one year after the expiration of any such five-year period setting forth those goods or services stated in the registration on or in connection with which such mark has been in continuous use for such five consecutive years and is still in use in commerce, and the other matters specified in subsections (1) and (2) of this section; and

(4) no incontestable right shall be acquired in a mark which is the common descriptive name of any article or substance, patented or otherwise.

15 U.S.C., section 1114:

(1) Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

shall be liable in a civil action by the registrant for the remedies hereinafter provided.

15 U.S.C., section 1115:

(a) Any registration issued under the Act of March 3, 1881, or the Act of February 20, 1905, or of a mark registered on the principal register provided by this chapter and owned by a party to an action shall be admissible in evidence and shall be prima facie evidence of registrant's exclusive right to use the registered mark in commerce on the goods or services specified in the registration subject to any conditions or limitations stated therein, but shall not preclude an opposing party from proving any legal or equitable defense or defect which might have been asserted if such mark had not been registered.

(b) If the right to use the registered mark has become incontestable under section 1065 of this title, the registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the affidavit filed under the provisions of said section 1065 subject to any conditions or limitations stated therein * * *.

15 U.S.C., section 1116:

The several courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant

injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent Office.

* * *

15 U.S.C., section 1121:

The district and territorial courts of the United States shall have original jurisdiction and the courts of appeal of the United States shall have appellate jurisdiction, of all actions arising under this chapter, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties.

15 U.S.C., section 1126:

* * *

(b) Any person whose country or origin is a party to any convention or treaty relating to trademarks, trade or commercial names, or the repression of unfair competition, to which the United States is also a party, or extends reciprocal rights to nationals of the United States by law, shall be entitled to the benefits of this section under the conditions expressed herein to the extent necessary to give effect to any provision of such convention, treaty or reciprocal law, in addition to the rights to which any owner of a mark is otherwise entitled by this chapter.

* * *

(g) Tradenames or commercial names of persons described in subsection (b) of this section shall be protected without the obligation of filing or registration whether or not they form parts of marks.

* * *

(h) Any person designated in subsection (b) of this section as entitled to the benefits and subject to the pro-

visions of this chapter shall be entitled to effective protection against unfair competition, and the remedies provided in this chapter for infringement of marks shall be available so far as they may be appropriate in repressing acts of unfair competition.

15 U.S.C., section 1127:

* * *

The terms "trade name" and "commercial name" include individual names and surnames, firm names and trade names used by manufacturers, industrialists, merchants, agriculturists, and others to identify their businesses, vocations, or occupations; the names or titles lawfully adopted and used by persons, firms, associations, corporations, companies, unions, and any manufacturing, industrial, commercial, agricultural, or other organization engaged in trade or commerce and capable of suing and being sued in a court of law.

The term "trade-mark" includes any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others.

The term "service mark" means a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others. Titles, character names and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor.

Appendix A

The applicable provisions of the California Business and Professions Code are as follows:

Section 14200:

Composition of mark. Except as otherwise provided in this chapter, a trade-mark may consist of any form, symbol, or name.

Section 14270:

Original owner. Any person who has first adopted and used a trade-mark, whether within or beyond the limits of this State, is its original owner.

Section 14300:

Injunction. Any court of competent jurisdiction may restrain, by injunction, any use of trade-marks in violation of the rights defined in this chapter and the use of any trade-mark registered in the office of the Secretary of State.

Section 14400:

Original owner. Any person who has first adopted and used a trade name, whether within or beyond the limits of this State, is its original owner.

Section 14402:

Injunction. Any court of competent jurisdiction may restrain, by injunction, any use of trade names in violation of the rights defined in this chapter.

Appendix B

Exhibits

[Rule 18(2)(f) of the Rules of the United States Court of Appeals for the Ninth Circuit]

Plaintiff's Exhibit No.	Page of Reporter's Transcript of Proceedings Identified	Offered	Received
1	17	17	18
2	17	17	18
3	17	17	18
4	31	31	31
5a	31	31	31
5b	31	31	31
5c	31	31	31
5d	31	31	31
5e	31	31	31
6a	32	32	32
6b	32	32	32
6c	32	32	32
6d	32	32	32
6e	32	32	32
6f	976–78	976–78	978
6g	976–78	976–78	978
6h	976–78	976–78	978
6i	976–78	976–78	978
7	257–59	259	259
8a	256–57	257	257
8b	256–57	257	257
9a	74	75	77
9b	74	75	77
9c	75	75	77
9d	75	75	77
9e	75	75	77
10a	70–71	70–71	71–72
10b	72–73	73	73
10d	58–59	61	61

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Plaintiff's Exhibit No.	Page of Reporter's Transcript of Proceedings Identified	Offered	Received
10f	64	64	69–70
10g	65	69	69–70
10i	65	69	69–70
10n	66	69	69–70
10o	65	69	69–70
10p	65	69	69–70
10q	66	69	69–70
10r	66	69	69–70
10t	66	69	69–70
10u	65	69	69–70
10v	66	69	69–70
10w	64	69	69–70
10x	66	69	69–70
10y	66	69	69–70
10z	66	69	69–70
10aa	67–68	69	69–70
10bb	68	69	69–70
10cc	68–69	69	69–70
10dd	529–30	529–30	530
10ee	529–30	529–30	530
11a	522	522	522
11b	522	522	522
11c	522	522	522
11d	522	522	522
11e	522	522	522
11f	522	522	522
11g	522	522	522
12	523	523	523
13	523	523	523
14	525	528	528
15	525	528	528
16	525	528	528
17	525, 528–29	528	528

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Plaintiff's Exhibit No.	Page of Reporter's Transcript of Proceedings Identified	Offered	Received
18	524	528	528
19a	525–26	528	528
19b	525–26	528	528
19c	525–26	528	528
19d	525–26	528	528
20	526–28	528	528
21	526–28	528	528
22	526–28	528	528
24	526–28	528	528
25	526–28	528	528
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48	524–25	528	528

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Plaintiff's Exhibit No.	Page of Reporter's Transcript of Proceedings Identified	Offered	Received
49	524–25	528	528
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61	524–25	528	528
62	524–25	528	528
63	524–25	528	528
64	524–25	528	528
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No. 22071

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VOLKSWAGENWERK AKTIENGESELLSCHAFT,

Appellant,

vs.

DOUGLAS D. CHURCH, doing business as MODERN SPECIALIST,

Appellee.

BRIEF FOR APPELLEE.

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No. 22071

IN THE

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VOLKSWAGENWERK AKTIENGESELLSCHAFT,

Appellant,

vs.

DOUGLAS D. CHURCH, doing business as MODERN SPECIALIST,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal by Volkswagenwerk Aktiengesellschaft, hereinafter referred to as "plaintiff", from a judgment in United States District Court for the Southern District of California, Central Division, rendered by the Honorable C. Nils Tavares and entered April 11, 1967, dismissing without costs a complaint for trademark infringement and unfair competition [CT 175-176].

Plaintiff is a corporation of the Federal Republic of Germany with its principal office of business at Wolfsburg Germany [CT 138]. Douglas D. Church, defendant in the court below and hereinafter referred to as "Church", is the owner and operator of an automobile repair shop in Long Beach, Los Angeles County,

California, specializing in the repair and service of Volkswagen and Porsche motor vehicles. He is a resident of Los Angeles County, California, and a citizen of that State [CT 138-139].

Plaintiff is the owner of the trade mark registration consisting of the word "Volkswagen", the letters, "VW", and an emblem consisting of the encircled "VW".

The court below had jurisdiction of the parties and the subject matter in that the action arose under the trademark laws of the United States and under the laws of unfair competition. It was brought pursuant to the Trademark Act of 1946, as amended, 15 U.S.C., Section 1051 *et seq.,* and the International Convention for the Protection of Industrial Property, signed at Paris on March 20, 1883, as revised at London, June 2, 1934, and at Lisbon, on October 31, 1958, 13 U.S. Treaties and Other International Agreements 1 (1962). Jurisdiction of the court was conferred by 15 U.S.C. Section 1121, and 28 U.S.C. Section 1338. Jurisdiction was also based on diversity of citizenship and on the fact that the matter of controversy exceeds the sum of $10,000 exclusive of interest and costs.

Jurisdiction over this appeal is conferred on this Court by 28 U.S.C., Section 1291, which plaintiff has invoked by notice of appeal filed May 8, 1967 [CT 177].

PREFACE.

One of the important facets of our American heritage, and one which has helped to make our country strong and healthy, is the right to engage in business and to lawfully compete with others who are similarly engaged.

The instant case involves the very root of our system of free enterprise and poses an example of a threat thereto. The plaintiff-appellant, a German corporation engaged in the manufacture of a small, inexpensive, popular line of motor vehicles, is herein attempting to virtually eliminate lawful competition by preventing independent repair and service facilities who specialize in the repair and service of its product from advertising to the public that they so specialize. Plaintiff implements its plan by attempting to prevent the independent facilities from using the name given by plaintiff to its products.

Plaintiff has characterized Church as a person who has capitalized on the reputation and goodwill of plaintiff without plaintiff's authority, and who has acted in direct contravention of plaintiff's rights. In truth, Church is a motor car enthusiast with sufficient initiative and ability to establish himself in an independent repair and service business specializing in the repair and service of motor vehicles manufactured by plaintiff and has attempted in no way to capitalize wrongfully upon the reputation and goodwill of plaintiff. Church has, in fact, for many years advertised to the public in general that his repair and service facility is independent of plaintiff.

Church asks only that he be allowed to continue fairly competing with plaintiff and its family, that he be allowed to continue advertising to the public that he is "An Independent Volkswagen and Porsche Service Center", and that he be allowed to continue rendering the high quality of service which has made his independent facility so popular to the owners of plaintiff's products that the members of plaintiff's family located in Church's area of influence have felt his competition.

SUMMARY OF ARGUMENT.

I.

Church does not deny that plaintiff has established a good reputation for the manufacture of its product, the Volkswagen motor vehicle. The trademarks owned by plaintiff have come to mean in the mind of the public that there is but one source for such vehicles, plaintiff. But such is not the case for *service* or *repair*. Plaintiff did not introduce one item of evidence to support its erroneous conclusion that only plaintiff can render "Volkswagen repair" and "Volkswagen service". Church has, however, introduced numerous items of evidence which clearly indicates that there are two sources of Volkswagen repair or service—(1) plaintiff's family or authorized agencies, and (2) independent Volkswagen repair and service facilities.

II.

Church, as an independent Volkswagen repair and service shop, has the absolute right to advertise to the public in general that he specializes in the repair and

service of plaintiff's product, that he has a complete stock of factory parts, and that he has a modern fully equipped shop. The evidence is uncontradicted that such are the facts, and plaintiff failed totally to establish otherwise.

III.

Church has at all times since 1959 when he changed the name of his business to "Modern Specialist" used the word "Volkswagen" and the initials "VW" in a denotive sense in advertising to the public that he renders "Volkswagen repair", "Volkswagen Service", "VW Repair", "VW Service". Church has gone one step further by proudly announcing that he is "AN INDEPENDENT VOLKSWAGEN & PORSCHE SERVICE CENTER." His premises are totally different from authorized agencies in size, shape, color; he has no new or used car sales facilities; his signs are totally different in size, shape, color combinations and content; and his classified telephone ad and all give-aways clearly spell out that he is "AN INDEPENDENT VOLKSWAGEN & PORSCHE SERVICE CENTER".

be considered in determining whether unfair competition was present. Nor did it commit error in refusing to issue to an injunction against Church in the absence of a likelihood of public confusion. The "intent" of Church is easily obtained in view of the evidence that several years in advance of the filing of this action he undertook the affirmative in advising to the public in general through his classified advertisement and elsewhere that his business was "independent" of plaintiff.

II.

CHURCH HAS THE ABSOLUTE RIGHT TO USE THE WORD "VOLKSWAGEN" ETC., IN ADVERTISING THAT HE SPECIALIZES IN THE REPAIR AND SERVICE OF THAT TYPE CAR.

The Applicable Law.

The law is clear in the type of case that is now before this court:

1. Anyone may legally engage in the business of repairing and supplying new parts to old automobiles as freely as they can go into the grocery business (*Dayton v. Imperial Sales and Parts Co.,* 195 Mich. 397, at 404; 161 N.W. 958 (1917) at 960).

2. To constitute a trademark violation or an act of unfair competition, each practice alleged to constitute a violation of the rights of another must be considered in its total environment and subjected to the test of (a) is the use of the trademark proprietary or denotive? If proprietary, a violation *per se* exists, while if denotive, the further test must be applied and the question asked (b) is the use likely to lead to public deception? "Reasonableness" must be used in weighing the latter question by the trier of fact. (*Dodge Bros. v.*

East, 8 F. 2d 872 (E.D. N.Y. 1925); *Ford Motor Co. v. Boone*, 244 Fed. 335 (9th Cir. 1917); *Ford Motor Co. v. Helms*, 25 F. Supp. 698 (E.D.N.Y. 1938)).

In addition to the automobile cases cited above, the rule is well stated in *Yale & Towne Mfg. Co. v. Haber* (E.D.N.Y. 1934), 7 F. Supp. 791 at 792:

> "Of course, defendant may advertise that it repairs Yale locks, but must do so in a way not calculated to deceive the public into the belief that the business conducted by it is the business of plaintiff."

Whether Church has used plaintiff's name in a manner calculated to deceive the public is a question of fact. Precedents are not of much help in deciding an issue of this kind.

> "It is elementary that in the decision of a case of this kind, involving the question of confusing similarity, each case must stand on its own facts and prior decisions are of little value." (*Fleischmann Distilling Corp. v. Maier Brewing Company* (9th Cir. 1963), 314 F. 2d 149, at 160).

The word "Volkswagen", and the initials or abbreviation "VW", are the name and initials or abbreviation given to the car by the plaintiff. Everyone has the right to refer to the cars manufactured by plaintiff, by advertisement or otherwise, by the name and initials given to plaintiff's product by plaintiff. The leading case in this regard is *Dodge Bros. v. East* (D.C.E.D.N.Y. 1925), 8 F. 2d 872. The *Dodge* case was instituted by Dodge Bros., the manufacturer of the Dodge car, against East, a used car dealer, for unfair competition, alleging that certain signs used by East

constituted acts of unfair competition as against Dodge. East was a used car dealer dealing exclusively in used Dodge cars, and operated a service station in connection therewith. The evidence showed that East used the following wording on his signs:

WM. V. EAST
USED DODGE CARS
EXCLUSIVELY

(Used at his service station)

814-WM. V. EAST
SERVICE STATION-814

REPAIRS
for
DODGE CARS

(Used on Letterhead)

WILLIAM V. EAST
DODGE BROTHERS USED CARS
EXCLUSIVELY
WM. V. EAST
DODGE DEALER
1270 Bedford Ave.
Brooklyn, N. Y.

The plaintiff, Dodge Bros., used in its advertisements the name "Dodge" in block type, in white letters on a very deep blue background, the letter "E" in the word "Dodge" having its middle stroke carried out slightly beyond the upper and lower stroke. At page 876 the court stated:

> "Nor is this a 'tradmark' case . . . Suffice it to state that plaintiff's product is known as a 'Dodge' car. By that name it alone can be fairly and properly described. If plaintiff had no definite and distinctive method of advertising its name, there would be no deception in its use, for, as said

in the case of *Vogue Company v. Thompson Hudson Company,* Supra, at page 511, while 'there is likely to be a considerable element of mistake on the part of purchasers who suppose that the use of the word indicates some connection with the magazine, it is a mistake for which plaintiff must carry the responsibility, because it chose as the name of its magazine a word which all are at liberty to use'. Thus it seems to me that an individual or a business concern could and must use the name 'Dodge' in describing which is in truth a 'Dodge' car. Where, however, it is not this name of its product, but an appropriation of a sign, adopted at great expense and over a long period of time, by plaintiff, for advertising its products, then the act of deception is in this intentional appropriation of this distinctive sign, not in the use of the name."

Again, the court stated at page 877:

". . . it would seem that his sign at the service station should not have the name 'Dodge' in these white block letters, with or without the peculiar "E" on a blue background. He can, however, have the name 'Dodge' in some other form of letters. With this criticism I see nothing to forbid in his present service station advertisement."

The court made the same comment as to the use of the word "Dodge" at the main place of business. With regard to the letterhead, the court felt that "Dodge Dealer" was wrong.

The *Dodge* case sets out the applicable standards to be met. At page 877 the court stated:

"Summing up the whole matter, it seems to me that, when plaintiff claims the public has been de-

> ceived, or is reasonably likely to be decieved, by the advertising of defendant, such deception must rest upon proof that defendant has appropriated something peculiarly belonging to plaintiff, and associated in the public's mind, by reason of expenditure of money and wide, continuous and uniform advertising, with plaintiff's business".

In view of the *Dodge* case it seems that three questions must be answered in the affirmative before the court should consider issuing an injunction which operates to prevent competition between the parties, namely, (1) has Church appropriated something peculiarly belonging to plaintiff, if so, then, (2) has that which has been appropriated become associated in the public's mind by reason of expenditure of money and wide, continuous and uniform advertising, with plaintiff's business, *i.e.,* a singleness of source for the product or *service,* and (3) is the method(s) used by Church in using that which peculiarly belongs to plaintiff likely to cause public confusion as to the source of the *service*?

The *Dodge* case has been followed recently in *Edwards v. Velvac, Inc.* (E.D. Wisc. 1956), 140 F. Supp. 936, and in *Volkswagenwerk, etc. v. Frank* (D. Colo. 1961), 198 F. Supp. 916. Another case, although not as much in point as the *Dodge* case, is *Ford Motor Co. v. Helms* (1938), 25 F. Supp. 698. Here the plaintiff moved for a temporary injunction. The defendant, a repair garage not specializing solely in the repair of Ford cars, installed a large vertical *neon sign* over the street in front of the building reading "FORD" in block letters; extending laterally therefrom and in letters somewhat smaller is the word "Repairs". Under the word "Repairs" on the lateral arm the sign contains the words "We Repair Ford Cars and Do Not Act

As Authorized Dealers". The qualifying words are also visible in daylight *but are not illuminated at night.* The court stated at page 699:

> "(1) It is equally clear that defendants have the right to repair cars of the plaintiff's and other's manufacture, and to tell the public that such is their calling. But they may not do it under any guise which would create or reasonably tend to create the impression that they repair Ford cars only (if that is not the truth—and it was said not to be by their attorney at argument) as a Ford Service Station; or that they are authorized dealers in Ford cars."

The court then went on to state:

> "Plaintiff seeks to protect its recognized goodwill and trademarks from the loss that might come to it through the false assumption by the owners of cars of its manufacturer, that the defendants maintain an authorized "service station" where repairs upon Ford cars are made by those who have been selected by the plaintiff as competent to do that; and where authentic parts of the plaintiff's manufacture are used for necessary replacements."

Factory Parts.

Plaintiff contends that Church's classified telephone directory ad is further objectionable because of the implication that the parts sold by Church originate with the "factory", that Church buys his parts from Risdon, and "Risdon's parts, since they are not acquired from plaintiff (640) have never had to pass its exacting quality control like the parts sold by authorized dealers." Plaintiff's citation to its Exhibit 9e, pages 218-219 thereof, in no way supports the point it attempts to make. It is urged that the court read pages 218 to 219

of plaintiff's Exhibit 9e, as well as plaintiff's Exhibit 69 I. Plaintiff's citations aforementioned do not indicate that Risdon's parts are not subject to the exacting quality control as parts sold by authorized dealers. Further, there is no indication whatsoever in any part of the transcript or exhibits in evidence that Church only buys parts from Risdon. Plaintiff conveniently did not ask Church if he purchased parts from any sources other than Risdon. Risdon's testimony, which is uncontroverted, states that he sells *new* Volkswagen parts, consisting of basic engine parts, bearings, and transmission parts. He does not acquire them from the Volkswagen factory, because the factory does not manufacture these parts. He acquires them from the same people from whom the Volkswagen factory purchases them [RT 639, line 23, to 640, line 16]. Further, the testimony of Mr. Michael Sanyour, Jr., vice-president of Volkswagen of America, supports the testimony of Mr. Risdon. Mr. Sanyour testified that the Volkswagen factory sub-contracts and allows others to manufacture and make special tools, other tools, and components of the Volkswagen product, and that such is a standard practice [RT 136, lines 6-24]. Thus, it can be seen that the parts sold by Church to his customers are, in fact, the same parts that the plaintiff purchases and which are ultimately distributed to plaintiff's family of authorized agencies and, in turn, sold to their customers.

Volkswagen Repair and Service.

Plaintiff has cited the case of *General Motors Corp. v. Smith,* 138 U.S.P.Q. 382 (S.D. Cal. 1963) in its "Brief for Appellant" at pages 33, 36, 41, 43, and 45, as supporting the proposition that an injunction should be issued because Church has used in his advertisements the terminology "Modern Volkswagen

Porsche Service". Plaintiff informs the court that an injunction was obtained prohibiting the defendant from using the name "Smith's Chevrolet Service". Plaintiff did not advise the court that the defendant in that case had been representing that he was an authorized Chevrolet dealer, and that he had been using the trademarked Chevrolet emblem. The injunction which was issued prevented the defendant from using the word "Chevrolet" as part of his firm or business name, or any other manner likely to cause public confusion, and from representing that he is an authorized Chevrolet dealer. A reading of plaintiff's summary of the case would indicate that it involved only the use of the firm or business name "Smith's Chevrolet Service", when in fact it involved a flagrant violation of the General Motors trademark "Chevrolet" (an artful fanciful name), the Chevrolet emblem, and representations made by the defendant that he was an authorized Chevrolet dealer. The only similarity between the instant case and the case cited by plaintiff aforementioned is that in 1958 Church used the word "Volkswagen" as part of his business name.

Plaintiff commits a similar error in its citation to *Fiat, etc. v. Vaughan*, 7 Misc. 2d 4, 166 N.Y.S. 2d 39, modified and affirmed, 5 App. Div. 2d 821, 170 N.Y. Supp. 2d 627 (1st. Dept. 1958), in its "Brief for Appellant" at pages 33, 36, 41, and 45. Plaintiff represents to the court that the defendant was ordered not to use the name "Fiat" *in any manner whatsoever* in connection with his business." (Emphasis added). Plaintiff failed to advise the court that the order preventing the defendant from using the name "Fiat" was limited solely to its *method* of use in the telephone directory. A reading of plaintiff's summary of the case would lead the reader to believe that the defendant could not use the name "Fiat" in any manner whatsoever *under any circumstances.*

On page 45 of its "Brief for Appellant" plaintiff cites *Yale & Towne, etc. v. Haber,* 7 F. Supp. 790 (E.D. N.Y. 1934), as authority for the proposition that a non-enfranchised service establishment could not use the terminology "Yale Lock Service" in the local telephone directory. Plaintiff omitted to inform the court that the defendant also falsely advertised that he was "Manufacturer's Agent for Yale" along with his other methods of advertising. Again, this sort of advertisement constitutes a flagrant violation of plaintiff's trademark "Yale."

On page 33 of its "Brief for Appellant", plaintiff cites *Volkswagenwerk G.m.b.H. v. Frank,* 198 F. Supp. 916 (D. Col. 1961), as standing for the proposition that a non-enfranchised service station specializing in the sale or repair, or both, of the products of a particular automobile manufacturer engages in a trademark infringement or unfair competition, or both, if he uses or imitates the manufacturer's name or mark in his trade name, or uses such mark to identify himself or his services. Not only is plaintiff's basic premise erroneous, but it fails to set forth the facts of the *Frank* case. The *Frank* case involved the sale of Volkswagen cars, and the use by the defendant of the firm or business name "VOLKSWAGEN CAR CENTER LTD.", "VOLKSWAGEN SALES AND SERVICE, INC.", "VOLKSWAGEN GERMAN MOTOR COMPANY", "VOLKSWAGEN FOREIGN CAR CENTER", and a bold display and the free use of the encircled VW emblem, etc. In the instant case, it is not contested that the public does not associate the word "Volkswagen" the initials "VW", and the encircled WV emblem with a *product* of high quality. However, again, in the instant case we are *not* dealing with the sale of a *product,* but with the rendition of a *service* to that product by an in-

dependent repair and service facility who has not used the type of firm name or names present in the *Frank* case. In the instant case, plaintiff has failed to present any testimony whatsoever that the public associates any of the foregoing names or symbols with a singleness of source for the rendition of repair or service.

Similarly, plaintiff has cited in its "Brief for Appellant", at pages 33 and 36, *Volkswagenwerk Aktiengesellschaft v. Volks City, Inc.,* Civil No. 403-64, D.N.J., June 23, 1964, affirmed, 348 F. 2d 659 (3rd Cir. 1965). In this case the defendant used the firm or business name "Volkswagen City" and "Volks City" as well as the terminology on business cards "NEW JERSEY'S LARGEST VOLKSWAGEN DEALER", together with other clearly objectionable language. Again, the *Volks City* case involved a factual circumstance not present here.

Reasonable Precautions.

At pages 29 and 52 of its "Brief for Appellant" plaintiff cites *American Waltham Watch Company v. U.S. Watch Co.,* 173 Mass. 85, 53 N.E. 141 (1899), as standing for the proposition that "reasonable precautions must be taken to avoid confusion" when using a term which has come to identify another's business or products. The case cited is in point. The court states that it is pretty well settled that the plaintiff merely on the strength of having been first in the field may put later-comers to the trouble of taking such reasonable precautions as are *commercially practical to prevent their lawful names and advertisements from deceitfully diverting the plaintiff's custom.*" (Emphasis added.) Church has gone beyond the "reasonable precautions" requirement spelled out in the *Waltham* case, and has proudly advertised the fact that he is

"AN INDEPENDENT VOLKSWAGEN AND PORSCHE SERVICE CENTER".

The United States Supreme Court in *Prestonettes Inc. v. Coty,* 264 U.S. 359 (1924), apparently recognized that the word "INDEPENDENT" adequately described the fact that the business using that word is not enfranchised or authorized by a trademark or trade name owner. The court required the defendant, a repackager, to use on his label, "Prestonetts, Inc., Not Connected with Coty, states that the contents are Coty's (giving the name of the article) *independently* rebottled in New York." (Emphasis added). Of course, in the instant case, we are not concerned with Church adopting any trade name belonging to plaintiff as a trade name for Church.

Independents Are Also Qualified Facilities.

Commencing on page 7 of plaintiff's "Brief for Appellant" under the headings "What is 'Volkswagen' ", and "The Goodwill Created for Volkswagen Products and 'Volkswagen Service' " and later at page 60 under the heading "The meaning of 'Volkswagen service' in Southern California", the plaintiff suggests quite clearly that only the services rendered by companies operating under the aegis and control of plaintiff, with mechanics trained by plaintiff, employing tools developed by plaintiff, using repair parts subject to plaintiff's quality control, working under the guidance of plaintiff's service literature and supervised by personnel approved by plaintiff, may properly use plaintiff's trademark to identify and describe the business they conduct and services they sell. If this suggestion is to be given full weight, which I am sure the plaintiff did not intend, then there are serveral authorized Volkswagen agencies who are not entitled to use

plaintiff's trademarks to identify and describe the business they conduct and the services they sell. Why? Because Al Tatti, an authorized Volkswagen agency in Downey sends its cars to Church for transmission overhauls, and Greene Motors, an authorized Volkswagen agency in Norwalk, sends its Volkswagens to Church for tune-ups, transmission work, and front end rebuilding [RT 914, line 16, to 916, line 9]; Lee Carpenter, an authorized Volkswagen agency in Compton and Rickets Motors, an authorized Volkswagen agency in Long Beach, purchase Volkswagen parts from Church [RT 913, line 18, to 914, line 12]; and authorized Volkswagen agencies send their wheel and suspension work to Tyerman, an independent, for the repair thereof [RT 704, line 21, to 706, line 2]. Can it be possible that the glorious goals, spelled out by plaintiff in its various contracts, and testified to by Mr. Sanyour, Vice-president of Volkswagen of America, Mr. Metz, Zone Service Manager for Volkswagen of America, and Mr. Christiensen, Director of Service for Volkswagen Pacific, Inc., are not implemented at the agency level? Is it possible that there are faults in the German Volkswagen regime?

Use of Silhouette.

In the first paragraph commencing on page 15 of plaintiff's "Brief for Appellant", plaintiff mentions that in Church's classified telephone ad there appears a silhouette of two cars, one of which is recognizable as the small Volkswagen sedan. Plaintiff choses to overlook the balance of the information appearing on the classified ad, and objects to the use of a silhouette of the sedan. It is true that Church, together with many other independent Volkswagen repair and service facilities, as well as numerous other repair and service facilities that do not specialize solely in the repair

of the Volkswagen product line, have used, and are now using, the silhouette of a Volkswagen in one or more forms of advertising. The independent facilities have done this for years, and Church has done it for at least four to six years prior to the institution of this law suit. However, the method of use of the silhouette of a Volkswagen by Church, as well as by the other independent repair and service facilites, is not violative of the rights of plaintiff.

Plaintiff has no trademark in the silhouette of a Volkswagen. It can only obtain an exclusive right to the use of a silhouette of its product *if* the method of use by an independent of the silhouette or picture when translated into word form, would constitute a violation of plaintiff's alleged trademark or trade name. In *Mershon Co. v. Pachmyer,* 220 F. 2d 879 (9th Cir. 1955), *Cert. den.* 350 U.S. 885 (1955), two parties were involved each of whom manufactured a rifle recoil pad. The plaintiff identified its recoil pad by the use of the words "White Line". After plaintiff had been using those words to identify its product, defendant actually placed a white line on its recoil pads. The court, and properly so, stated that the use of a white line was the equivalent of the word identification "White Line", and therefore enjoined the defendant from its conduct.

Again, in *Alligator Co. v. Ciarochi,* 141 F. Supp. 806 (E.D. Pa. 1956) a similar question arose. Plaintiff manufactures raincoats and coats and defendant manufactures belts and accessories. Plaintiff used the trademark "Alligator" on its products and the defendant used the trademark "Styligator" or a picture or a representation of an alligator in its product. The court felt that the use of the picture of the alligator on the product manufactured by the defendant constituted an

infringement of the trademark of the plaintiff in the word form of "Alligator". In the instant case, Church does not manufacture any products whatsoever. He renders only a service. The use by Church of the silhouette of a Volkswagen in his classified telephone directory ad is only a small part of that ad, and the entirety of the ad should be looked at in order to determine whether the ad is violative of any rights of plaintiff. The silhouette is used only for the purpose of attracting the attention of a classified telephone directory user who is seeking to determine where a repair facility is located which specializes in the Volkswagen product line. If nothing else appeared on the ad but the silhouette of the Volkswagen, plaintiff might be correct in its contention. However, again, plaintiff's view point that each part of an entire ad must be looked at separately, is not correct. The large, bold, print adopted by Church for many years "AN INDEPENDENT VOLKSWAGEN & PORSCHE SERVICE CENTER", clearly qualifies and explains to the reader that Church is not enfranchised by plaintiff. It further informs the reader that Church renders service and repair to the Volkswagen product line, and, in addition, the Porsche product line [the ad also carries a picture of a Porsche; Deft. Ex. F].

In the *Alligator Co.* case, at pages 808 to 809, the court quoted the text of the test set forth in *Sears, Roebuck & Co. v. Johnson,* 219 F. 2d 590 to 592:

> ". . . The Restatement of the Law of Torts, Sec. 729 (1938), sets forth the generally accepted factors to be considered in determining whether a particular designation is confusingly similar to another's trade name:
>
> " '(a) the degree of similarity between the designation and the trademark or trade name in

"'(i) appearance;

"'(ii) pronunciation of the words used;

"'(iii) verbal translation of the pictures or designs involved;

"'(iv) suggestions;

"'(b) the intent of the actor in adopting the designation;

"'(c) the relation in use and the manner of marketing between the goods or services marketed by the actor and those marketed by the other;

"'(d) the degree of care likely to be exercised by purchasers.'"

Taking the test set forth above, it is probably true that the picture or silhouette of a Volkswagen would remind the person looking thereat of the word "Volkswagen". There is little similarity in appearance, however. Pronunciation of the words used is not relevant in the instant case. Verbal translation of the silhouette or picture involved has just been noted. Looking at the picture or silhouette suggests to the viewer the word "Volkswagen". Church's intent in adopting the designation is to aid the viewer in picking out a repair or service facility specializing in the repair and service of the Volkswagen product line. The relation in use and manner of marketing between the services of Church and the services rendered by plaintiff's authorized Volkswagen agencies has been the subject of much testimony. The advertisements appearing in the classified section of the telephone directories on behalf of authorized Volkswagen agencies is not the method recommended by plaintiff, but is a local method adopted by the agencies. In such ads the local authorized agencies use the encircled VW emblem together with the words "AUTHORIZED" in describing their facili-

ties. The numerous independent facilities have historically used, as is evident from the exhibits in evidence, the picture and/or silhouette of the various products which they specialize in, and do not use the word "AUTHORIZED" nor the manufacturer's emblem. Further, Church clearly spells out in large letters that he is "AN INDEPENDENT VOLKSWAGEN & PORSCHE SERVICE CENTER". The degree of care likely to be exercised by purchasers has been evidenced over the years by the total lack of any evidence on behalf of plaintiff that any person whatsoever has been deceived into believing that Church renders authorized service.

III.

COMMENCING IN 1959, ALL FORMS OF ADVERTISING HAVE BEEN DENOTIVE AND NOT PROPRIETARY.

It is essential to an appellate determination of this case that an accurate chronology be set forth. In this regard, each item of advertisement adopted by Church shall be detailed separately below as well as other facts relative to the issues raised by plaintiff.

Chronology of Events.

A. Church's History of Experience Prior to Going Into Business for Himself.

At the time of the trial Church was twenty-seven years old. When Church was seventeen years old he started to work at Cavin's Wrecking Yard in Long Beach. He worked there a little over one year starting on the used car lot cleaning the cars and getting them running by giving them tune-ups. He also drove

a tow truck and worked in the shop repairing American made auomobiles.

His next job was with Storey & Ricketts, an authorized Volkswagen agency in Long Beach. He started his employment there in 1956 and worked for approximately one year. During the course of this employment his job was that of a mechanic. Prior to working for the Volkswagen agency he had no experience in the repair or service of Volkswagen automobiles. His duties at the agency consisted of doing brake work, clutch work, tune-ups, front wheel alignment, engine overhaul, transmission work, the latter, however, in insufficient quantities to be classified as a "major" mechanic. A "major" mechanic is one who is proficient in the overhaul of engines and transmissions.

At no time during the course of his employment at the Volkswagen agency did he receive any training by his employer or any other members of the Volkswagen family. His experience was gained through his own initiative and desire to learn.

His next job was with Fox's Volkswagen & Porsche Service in Studio City, San Fernando Valley, California. Fox's was an independent Volkswagen facility. He ran the shop for the owner for approximately one year, doing all of the work including lube jobs through major engine and transmission overhaul. While so employed he performed approximately fifty major overhauls including engine and transmission. In addition, he performed service on at least six hundred Volkswagens. He left his employment at Fox's in the latter part of 1957 [RT 858, line 6, to 869, line 5].

B. Church's History and Entry Into His Own Business.

In 1958 Church opened his own shop [RT 869, lines 4-5]. At that time he was approximately 21 years old.

His first shop was located on the corner of Orange Avenue and Bixby Road, Long Beach, California, and he specialized in the repair of Volkswagen and Porsche cars [RT 858, line 18, to 859, line 4].

From the date he first opened his own shop, to date of trial, it has been a sole proprietorship [RT 859, lines 5-15].

When Church initially went into business in 1958, he did so under the fictitious name "Modern Volkswagen and Porsche Service", and used that name until 1959, at which time he changed the name of his business to "Modern Specialist" [RT 869, line 6, to 871, line 10]. The Certificate of Doing Business under Fictitious Name "Modern Volkswagen & Porsche Service", was dated July 30, 1958 [Pltf. Ex. 12].

Church changed the name of his business "Modern Specialist" because of letters which he had received from the plaintiff stating that he was infringing on its right [RT 871, line 22, to 872, line 3].

In that connection, it is to be noted that the first letter mailed to Church by plaintiff was dated October 16, 1959, and was addressed to Church at his second place of business located on Cherry Avenue, Long Beach, where he is presently situated [RT 872, lines 4-19; Pltf. Ex. 27]. Church has been at his present address on Cherry Avenue since approximately 1959 [RT 858, lines 12-17]. Church had been in business

from at least July 30, 1958, to October 16, 1959, before plaintiff saw fit to place him on notice of its claim.

The Certificate of Doing Business under the fictitious name of "Modern Specialist" is dated October 4, 1960 [RT 871, lines 11-17; Pltf. Ex. 13]. Plaintiff would have the court assume that it was not until October 4, 1960, that Church ceased using the fictitious name "Modern Volkswagen & Porsche Service", but evidence clearly indicates that it was 1959 [RT 869, line 6, to 871, line 10].

C. Telephone Directory Ads.

When Church initially went into business in 1958 he caused a classified ad to be placed in the Long Beach telephone directory which ad ran for approximately one year. When he moved to his Cherry Avenue address, he ordered another advertisement to be placed in the same directory [RT 872, line 20, to 874, line 3; Pltf. Ex. 11a].

The first classified ad appearing in the Long Beach telephone directory concerning his Cherry Avenue address, which ad contained the encircled VW emblem, was not an ad authorized or placed by Church. The ad ordered by Church had been altered and enlarged by the telephone company. Due to the error, the telephone company did not make any charge for the incorrect ad. It was the unauthorized ad which was referred to in plaintiff's initial correspondence [RT 874, line 7, to 876, line 14; Pltf. Ex. 11b].

The initial telephone ad [Pltf. Ex. 11a] ran from October 1958 to October, 1959; the next ad [Pltf. Ex. 11b], the *unauthorized ad,* ran from October 1959, to October, 1960; and the next ad [Pltf. Ex. 11c], which was the first ad Church caused to be placed in

the directory at his Cherry Avenue address, ran from October 1960, to October, 1961 [RT 876, line 15, to 879, line 1].

From the date of plaintiff's first letter to Church, October 16, 1959, to the date of the publication of the new Certificate of Doing Business under the fictitious name of "Modern Specialist", at least eleven items of correspondence were transmitted back and forth between plaintiff's attorneys and Church's attorneys [Pltf. Exs. 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37]. It is interesting to note that in the letter from plaintiff's attorney addressed to Church's attorney dated September 28, 1960, plaintiff states that it believes "that the uses by your client of the word 'Volkswagen' in the context of the trade name *and otherwise,* are infringements of our rights." [Emphasis added; Pltf. Ex. 36]. From this letter the true intent of plaintiff is manifested. The reader of such a letter might reasonably assume that "otherwise" includes *any* use of the word "Volkswagen" that an independent repair and service facility may make thereof, *i.e.,* even a "denotive" use.

After Church changed his name to "Modern Specialist", by the formal publication of a Certificate of Doing Business under a fictitious name on October 4, 1960, it was not until March 7, 1962, a year and one-half later, that plaintiff next saw fit to inform Church that plaintiff felt Church's advertisements during the year and one-half interval infringed upon plaintiff's rights [Pltf. Ex. 38]. After another eleven items of correspondence had been transmitted between plaintiff's attorneys and Church's attorneys, which items of correspondence discussed the various items of differences of opinion [Pltf. Exs. 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 48], Church transmitted to plaintiff a copy

of his proposed classified advertisement in the Long Beach telephone directory [Pltf. Ex. 49].

The proposed telephone advertisement, although objected to by plaintiff, was placed in the telephone directory in its October, 1962, issue and appears therein to date [Pltf. Ex. 11e, 11f, 11g, and Deft. Ex. F]. The ad placed in the October, 1962, directory (which appears to date) is the ad bearing the caption, "AN INDEPENDENT VOLKSWAGEN & PORSCHE SERVICE CENTER", in addition to the name of Church's business. "Modern Specialist", and the silhouette of a Volkswagen car and a picture of a Porsche car.

In plaintiff's letter dated August 29, 1962, plaintiff states, in part, "Thank you for your letter of August 21, 1962, in which you propose on behalf of Modern Specialist to insert in the Long Beach telephone directory the classified advertisement which would include the phrase:

AN INDEPENDENT
VOLKSWAGEN
& PORSCHE
SERVICE CENTER

"Your letter also proposes as part of the format for Modern Specialist's business card the following phrase (in words of the same size and type):

INDEPENDENT
VOLKSWAGEN
PORSCHE
SERVICING

"We will not object to the proposed use of this latter phrase on Modern Specialist's business card, business letterhead, repair order forms or in its classified advertising.

> "It is our position, however, that the expression "Volkswagen Service Center" set forth in the proposed classified advertisement would deceptively create the false impression that Modern Specialist offers services having the authorization or approval of our client. We must insist that the classified advertisement be revised so as to eliminate this deceptive expression or that the advertisement not be published." [Pltf. Ex. 53].

Thus, in August, 1962, plaintiff informed Church that it would *not* object to the phraseology "INDEPENDENT VOLKSWAGEN PORSCHE SERVICING" but that it would object to the phraseology "AN INDEPENDENT VOLKSWAGEN & PORSCHE SERVICE CENTER", that portion of the latter phraseology objected to being "VOLKSWAGEN . . . SERVICE CENTER".

Finally, on April 7, 1964, nearly two years and twelve additional items of correspondence later, plaintiff filed the instant action [Pltf. Exs. 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, and 64]. It was in Church's letter to plaintiff dated August 31, 1962, over a year and a half prior to plaintiff's instant action being filed, that Church drew the line at which he "must stand and defend" [Pltf. Ex. 54].

By summary, the first ad appearing in the Long Beach directory [Pltf. Ex. 11a] ran for the period commencing October, 1958, to October, 1959, and that no objection thereto was lodged with Church by plaintiff.

The second ad [Pltf. Ex. 11b], containing the encircled "VW" emblem and the name of Church's business "Modern Volkswagen & Porsche" together with the wording "Volkswagen, Porsche Service Specialists",

ran from October, 1959, to October, 1960, and was the ad which plaintiff objected to in its letter dated October 16, 1959 [Pltf. Ex. 27]. However, this ad is in no way involved in this lawsuit since it is the one which Church did not authorize to be placed, and for which the telephone company made no charge due to its error.

The third ad [Pltf. Ex. 11c] ran from October, 1960, to October, 1961, contained the name of Church's business in large letters at the top "Modern Specialist", thereunder and in smaller print the wording "Exclusively Volkswagen & Porsche Repairing & Service", and the additional language "fully equipped parts dept." In addition, the ad contains the picture of Church's shop which in no way bears any resemblance to any authorized Volkswagen agency either in size, shape or color combinations (Compare the photographs of Church's premises [Pltf. Ex. 17 and Deft. Ex. B-1], with photographs of numerous authorized Volkswagen agencies [Pltf. Exs. 69a, 69b, 69c, 69d, 69e, 69f, 69g; Deft. Ex. A-1, A-2, A-3, A-4, and A-5]).

The fourth ad [Pltf. Ex. 11d] appeared from October, 1961, to October, 1962. The top bears the information "Volkswagen & Porsche Repairing & Service", thereafter the additional words, "Modern fully-equipped shop", "Complete stock factory parts", and near the bottom the name of Church's business "Modern Specialist". In addition, there appeared a silhouette of a Volkswagen car and a picture of the Porsche car.

Plaintiff has suggested that a comparison of Plaintiff's Exhibit 11c with Plaintiff's Exhibit 11d reveals that for the phrase "Fully equipped parts dept." there was substituted the phrase "Complete stock factory parts" to conjure up immediately the suggestion

of some "factory" connection (Pltf. Op. Br. in the Trial Court, p. 30, lines 16-19). In addition, plaintiff further states at the aforementioned citation that "defendant's trade name was reduced in size and demoted to the bottom and the greatest prominence was given to the following language: 'Volkswagen & Porsche repairing & service modern, fully-equipped shop, complete stock, factory parts' ". Contrary to plaintiff's unbased and unsupported suggestion, Church changed his ad to truthfully state that his shop was a modern, fully-equipped shop, and that it has a complete stock of factory parts. Any further differences between the two ads do not warrant comment. At no time during the course of the trial did plaintiff make any attempt to show that the advertising aforementioned was not factually correct.

The last series of ads [Pltf. Ex. 11e, 11f, 11g; Deft. Ex. F] have appeared in the directory since October, 1962, to date of the trial. These ads are clearly self explanatory and advertise unequivocally that Church is "AN INDEPENDENT VOLKSWAGEN & PORSCHE SERVICE CENTER", that he has "Modern, fully-equipped shop", that he maintains a "complete stock of factory parts", that he renders "free estimates", that "all work guaranteed", and that the name of his business is "Modern Specialist".

A comparison of the advertisement utilized by Church with those utilized by authorized Volkswagen agencies reveals that in each instance the authorized agencies used the term "Authorized Volkswagen Dealer", or "Authorized VW Dealer", and also used the encircled VW emblem [Deft. Exs. L-1, L-2, L-3, L-4, L-5, L-6, and L-7]. The foregoing exhibits are examples of advertising done by authorized Volkswagen agencies in the Los Angeles County area. The differences in the meth-

ods of advertising adopted by Church and those adopted by the authorized Volkswagen dealers are dramatic and easily ascertainable by any member of the public desiring to seek out either an independent facility or an authorized facility.

Additional examples of advertisement done by independent Volkswagen repair and service centers in the Los Angeles and Orange County areas are reflected in Defendant's Exhibit O-1, showing an independent Volkswagen facility advertising the sale of Volkswagen automobiles "Independent VW Sales and Service"; O-2, a series of ads from the 1961 and 1962 Orange County and Los Angeles County area directors; O-5, the 1963 blue area directory, O-8, the 1965 Orange area directory; O-11, the 1965 blue area directory; O-12, the 1965 Orange area directory; O-13, the 1965 Orange area directory; and O-14, the 1965 Orange area directory (the various Orange area directories covering the same year do not cover the same area within the total Orange area). The foregoing exhibits show the use of the term "INDEPENDENT" by the independent repair and service facilities, the term "AUTHORIZED" by the authorized Volkswagen agencies, the use by the independent facilities of the silhouette of the Volkswagen car, the terminology "factory trained" personnel, "factory parts", and related terminology similar to that used by Church in the instant case. A comparison of the advertisements done by the independent facilities and the authorized facilities immediately reveals the lack of any possibility of any public confusion.

Further examples of advertising done by the independent facilities in the Los Angeles County area are reflected by Defendant's Exhibits Q, R, S, and T which are photographs of advertising done by German Motors, and Defendant's Exhibit U, a business card

from that facility. In each instance the terminology "INDEPENDENT VOLKSWAGEN CAR SERVICE CENTER", or similar language, appears, in addition to name of the business. Defendant's Exhibit P is a photograph showing the front of Karl's Garage in Covina, Los Angeles County, California, and demonstrates the use of the wording "INDEPENDENT VOLKSWAGEN PORSCHE SERVICE CENTER" across the front of the building occupied by that independent repair and service facility. Karl's Garage has used that advertisement since at least December 10, 1963 [RT 974, line 18, to 975, line 25].

D. Repair Order Forms.

Since Church commenced business in 1959 on Cherry Street, he has used the same general type of repair order form. Up to approximately one year before the trial of the instant case, he used the repair order form containing the following, "MODERN SPECIALIST", and below that in smaller letters, "VOLKSWAGEN & PORSCHE SERVICE". The only change in the repair order form was the addition of the word "INDEPENDENT" preceding the wording "VOLKSWAGEN & PORSCHE SERVICE, so that the phrase now reads, "INDEPENDENT VOLKSWAGEN & PORSCHE SERVICE". [RT 880, line 2, to 882, line 1; Pltf. Exs. 18 and 20]. The repair order form is only received by a customer *after* work has been performed on a car. Thus, if the phraseology reflected on Plaintiff's Exhibit 18, denoting Church's specialty, constitutes "advertisement" at all, it is advertisement after the fact. However, the phraseology "VOLKSWAGEN & PORSCHE SERVICE" merely advises the customer that Modern Specialist specializes in service to Volkswagen and Porsche cars. The addition of the word "INDEPENDENT" to the aforementioned

phraseology was merely an additional effort being made by Church to placate plaintiff. The addition of the word "INDEPENDENT" in no way constitutes a concession that the wording "VOLKSWAGEN & PORSCHE SERVICE" constitutes a proprietary rather than denotive information.

E. Pole Sign.

Church has a pole sign on the front of his premises. The sign has been there for approximately three years prior to the trial. Initially, the sign contained the information reflected in Plaintiff's Exhibit 14. It will be noted by an examination of that exhibit that the sign advertises the name of Church's business "MODERN SPECIALIST" and thereafter appears the word "VOLKSWAGEN" and the word "PORSCHE", in addition to the word "REPAIR" [Deft. Ex. B-2]. A color photograph, more accurately portrays the sign together with its color combination, which is not blue and white, nor does it embrace Memphis Bold type. Lastly, an examination of the pole sign reveals that it in no way remotely resembles any of the authorized Volkswagen Agency signs. The word "VOLKSWAGEN" has not appeared on the pole sign for approximately one year prior to trial [RT 885, line 11, to 888, line 7; Deft. Ex. B-2; Pltf. Exs. 14 and 15]. Again, Church removed the word "VOLKSWAGEN" from the sign to placate plaintiff even though at that time the law suit had been served upon him. Plaintiff would have the court believe that the removal of the word from the sign constitutes a concession on the part of Church that its use was a violation of some right owned by plaintiff. This is not the truth, however.

F. Truck.

Church acquired a Volkswagen pick-up truck in 1958. At that time it was olive green. He painted on it the words, "Modern Volkswagen" and the words "Modern Volkswagen Porsche Servicing". About 1960 he painted it white [Pltf. Ex. 16]. The vehicle remained white for over a year at which time it was painted grey, which is the color it is painted at the present time [Deft. Ex. B-3; RT 888, line 8, to 889, line 15]. Except as noted in the following paragraph the truck, as it was painted at the date of trial, with the advertisements thereon, have been so painted for the last two and a half to three years [RT 884, line 10, to 885, line 10]. It is hardly conceivable that such advertising would have the tendency to mislead the public into believing that Church operated an authorized Volkswagen Agency.

When the truck was painted grey, some two and a half to three years prior to the institution of this law suit, and the name of Church's business "MODERN SPECIALIST" prominently displayed on the vehicle together with the wording "VOLKSWAGEN—PORSCHE SERVICING" plaintiff still complained about Church's use of the word "VOLKSWAGEN". Again in order to placate plaintiff, early in 1963, approximately one year before the institution of this law suit, Church added the word "INDEPENDENT" to the phraseology "VOLKSWAGEN & PORSCHE SERVICING", so that it read, and now reads, "INDEPENDENT VOLKSWAGEN & PORSCHE SERVICING." [RT 888, line 8, to 889, line 15; Deft. Ex. B-3; Pltf. Ex. 59].

G. Business Cards.

Church has used a form of business card since opening his original shop in 1958. Plaintiff's Exhibit 19a is an example of the type of card Church used approxi-

mately four and a half years prior to the trial. He used that card less than a year, discontinuing it when he received a letter from plaintiff. Next he commenced using a card exemplified by Plaintiff's Exhibit 19b, with the word "INDEPENDENT" stamped on it. He started using that card a little less than a year after he opened his Cherry Street shop. He used it for approximately eight months to one year. Then he changed to a business card exemplified by Plaintiff's Exhibit 19c, containing a larger "INDEPENDENT" on the top thereof. Again, as a result of the harassment by plaintiff, Church changed business cards to the card which he has used for the three years prior to trial, and to date, exemplified by Plaintiff Exhibit 19d. The card aforementioned bears the name of Church's business "MODERN SPECIALIST" in prominent letters, followed by the words "INDEPENDENT VOLKSWAGEN-PORSCHE SERVICING." [RT 889, line 16, to 892, line 30; Pltf. Ex. 19a, 19b, 9c, and 19d]. Again, it is inconceivable that anyone would be deceived or confused in reading any of the business cards used by Church into believing that his facility was one of those authorized by plaintiff.

H. Sign on Building Face.

Along the top of the face of Church's place of business, in black lettering on a tan building, the wording "MODERN VOLKSWAGEN PORSCHE SERVICE" initially appeared. Contemporaneous with the filing of the law suit, the word "MODERN" was removed from the face of the building, and the word "INDEPENDENT" was placed thereon. Plaintiff's Exhibit 17 does not accurately reflect the face of the building. It omits a substantial portion thereof and leads the viewer to an erroneous conclusion. An accurate example of the face of the building as it appears

is reflected in Defendant's Exhibit B-1. Thus, the sign which appears above the shop door of Church's building reads "INDEPENDENT VOLKSWAGEN PORSCHE SERVICE." In Plaintiff's Opening Brief, in the court below, page 35, lines 5-23, plaintiff falsely asserts that the foregoing phraseology is not intended to be read as a continuous whole because each word is centered over one of four sets of garage doors divided from its neighbor by the roof supports, which would allow the casual passer-by to infer that each word is independent of the other three and refers to a separate aspect of the business being conducted on the premises. This erroneous assertion by plaintiff can easily be distinguished from the truth by observing the presentation as is reflected by Defendants Exhibit B-1.

I. Give-Aways.

In addition to the above methods of advertising adopted by Church, the following type of give-aways are used: a plastic litter bag used for over a year prior to the institution of the law suit, containing the black lettering on a white background "INDEPENDENT VOLKSWAGEN PORSCHE SERVICE", in addition to the very prominent display of the name of Church's business [RT 893, line 13, to 894, line 3; Pltf. Ex. 22]; a match cover bearing advertisements by Valvoline Motor Oil on one side and Church's advertisements on the other. Valvoline and Church shared the expense thereof. This method has been used for approximately two years prior to trial, and bears the wording "INDEPENDENT VOLKSWAGEN & PORSCHE SERVICING" in addition to the prominent display of the name of Church's business "MODERN SPECIALIST" [RT 894, lines 4-21; Pltf. Ex. 21]; a ballpoint pen used for one year prior to trial containing, in part, the phraseology "INDE-

some times run out of parts, procure parts from sources outside the Volkswagen family, install such parts in their customers' cars, and refer their own work to independent facilities, which, by inference, can perform work which the authorized agency involved is unable to perform. This latter part is further borne out by the fact that certain authorzied Volkswagen agencies in the San Fernando Valley area send their customers' cars to the facilities of David Tyerman, the owner of an independent wheel and brake shop in Burbank for repair by that independent facility [RT 704, line 21, to 706, line 2]. However, it is not surprising that there are mechanics outside the Volkswagen family of mechanics who are capable of performing acceptable work on the Volkswagen product line since the Volkswagen engine is easier to work on than American made engines, because it has lighter parts, easier to remove, is easier to clean up for inspection, it has more liberal tolerances, and less moving parts [RT 909, line 13, to 910, line 4]. This is consistent with plaintiff's national advertisements that it is a simple car and uncomplicated [RT 175, line 6, to 176, line 11]. In spite of plaintiff's advertisements, plaintiff's executive personnel called by it as witnesses indicated quite clearly that only mechanics employed by plaintiff's family were capable of performing acceptable Volkswagen repair and service [RT 126, line 6, to 127, line 11; 499, line 21, to 500, line 8; 1093, line 24, to 1094, line 6]. Apparently there is some disagreement between plaintiff's executive level and certain members of plaintiff's family of agencies, the latter having more practical experience.

M. Church's Shop Fully Equipped.

Not only does Church have the ability to perform acceptable, if not vastly superior, service and repair on the Volkswagen product line, but his shop is equipped

with the special Volkswagen tools and current workshop bulletins printed and issued by the plaintiff concerning the latest changes and procedures for the repair of plaintiff's product [RT 942, line 12, to 943, line 1; 943, lines 16-18; 947, line 8, to 948, line 11; 950, line 20, to 952, line 8; 952, line 9, to 955, line 20; Deft. Exs. AA, AB, and K]. He does not have the eleven volume set of workshop manuals at his shop because everything contained therein is covered in the "Work Shop Bulletins" as exemplified by Defendant's Exhibit K [RT 1028, lines 4-23]. In other words, plaintiff first puts out a workshop bulletin notifying its family of certain changes, and thereafter the various workshop bulletins are incorporated into the shop manuals which then supercede the workshop bulletin [RT 363, lines 14-19]. However, Church goes further in providing facilities for his customers by using American electrical type tools for tuning [RT 942, line 12, to 943, line 1]. Perhaps the initiative exercised by Church in the conduct of his business accounts for the success he has worked hard for.

N. Plaintiff Has No Complaints About Church's Work.

Neither plaintiff nor its wholly-owned American importer, Volkswagen of America, have ever received either an oral or written complaint from any person who has patronized Church pertaining to the repair or service of any Volkswagen vehicle [CT 32, Plaintiff's Answers to Interrogatories Nos. 34 and 36]. The only evidence of anything remotely relating to a "complaint" received concerning service which "might" have been performed at Church's place of business was brought out in the testimony of Samuel Weill, Jr., Executive Vice-President and General Manager of Volkswagen Pacific, the distributor for plaintiff in the Southern California, Arizona, Southern Nevada, and

Hawaii areas. He testified that a woman, whose name he could not remember, spoke with him on the telephone two and a half to three years prior to the trial wanting to know (1) whether the price charged for certain work was fair, which he could not answer because he did not know the work, and (2) she related that she felt the work was unsatisfactory. Other than the aforementioned contact, he has never received a complaint concerning any service or repair rendered by Church [RT 1091, line 7, to 1092, line 3]. Further, concerning the complaint of the unknown woman, the witness did not know whether she was referring to Church's business or some other business named "Modern Specialist", since the woman did not mention Church's name nor the address of the shop which she was complaining about [RT 1107, line 15, to 1109, line 14].

O. Complaints Received About Independents and About Authorized Facilities.

Witness Weill had been employed by Volkswagen Pacific, the distributor, for the last thirteen years, and as part of his business he has had occasion to answer complaints and talk to people who have complaints [RT 1060, line 21, to 1062, line 20]. Over the thirteen years he had been so employed, he has come into contact personally with approximately 400 written letters of complaint [RT 1066, line 24, to 1068, line 17]. Of the aforementioned number of letter complaints, one-third to one-half relate to the repair and service of automobiles and the balance relate to the sale of automobiles [RT 1069, line 23, to 1071, line 22]. Of the one-third to one-half of the complaints aforementioned approximately 50% relate to service or repair rendered by independent facilities, and then he went on to state, "but I'm not talking about just letters; we're talking about phone calls and personal contact." [RT

1071, line 23, to 1072, line 4]. Of the complaints relative to independent facilities, the general complaints relate to the inability to procure the warranty terms on a car because work was done at an independent facility, or that the complainant was under the impression that the facility was a member of the Volkswagen family, or they complained of the quality of work, or about certain parts or accessories that may have been installed upon their car [RT 1072, line 5, to 1073, line 7].

It appears that in the last thirteen years this witness has, at the most, received 100 complaints relative to independent facilities, which number is surprisingly small. As to the number of complaints that he has received *from customers of authorized Volkswagen agencies* relative to the repair and service rendered thereat, his response to the question was,

> "it is extremely difficult because there are, and have been very high in number. Sometimes two and three and four a day, which, if I am not immediately able to furnish the customer with an answer, I will transfer to either my warranty or my service department." [RT 1073, line 13 to 1074, line 11].

If one were to multiply three complaints a day relative to service and repair rendered by *authorized agencies* times thirteen years, the number of complaints would be staggering.

P. Plaintiff's Reputation for Repair and Service.

The testimony of Mr. Weill concerning the number of complaints received by him relative to the repair and service rendered by authorized Volkswagen agencies over the last thirteen years is not inconsistent with the testimony of Church's witnesses relative to the reputation of authorized Volkswagen agencies in the South-

ern California area. Forrest Emard is a resident of Orange County and has been for the past ten years, he is assistant manager of the First Western Bank in Santa Ana, and an owner of three Volkswagens commencing in 1956. Based upon his experience with authorized Volkswagen agencies, and his knowledge of their general reputation, such general reputation for repair service rendered by them in his community is "not good, just fair." [RT 532, line 23, to 535, line 9].

Mr. Herbert Nakagawa, an engineering laboratory mechanic employed by North American Aviation based at Seal Beach, Orange County, residing in Long Beach, Los Angeles County, for the last twenty years, and an owner of a Volkswagen car since 1958, stated that his knowledge of the general reputation of the Volkswagen agencies in his community for repair and service rendered by them is "not too good" [RT 542, line 10, to 545, line 12].

Mr. Richard Robinson, a vice-principal of a public high school in Lakewood, Los Angeles County, so employed for fourteen years, resident of Long Beach, Los Angeles County for thirty-six years, and an owner of a Volkswagen since 1957, stated that his knowledge of the reputation of authorized Volkswagen agencies in his community for repair and service is "generally very poor" [RT 553, line 6, to 554, line 24].

Mr. Werner Schenk, a mathematics teacher at Loyola High School, so employed for the last five years, a resident of Santa Monica, Los Angeles County for the last five years, and an owner of a Volkswagen car from 1960 to 1963, stated that his knowledge of the general reputation of the authorized Volkswagen agencies in his community for repair and service is "poor" [RT 567, line 3, to 570, line 8].

Mr. Richard Lewellyn, director of the Los Angeles Athletic Club and Allied Clubs, so employed for the last ten years, a resident of Hollydale, Los Angeles County, California, for forty-two years, and owner of a Volkswagen from 1961 to 1963, stated that his knowledge of the general reputation of the Volkswagen agencies in his community for repair and service rendered by them was "good and bad", meaning, that as to the particular agency which he had reference to there was discontent there and that as a result thereof the customers left that agency for the service problems that were involved [RT 581, line 16, to 584, line 25; 588, lines 1-15].

Mr. Gene Risdon, presently an importer of Volkswagen products, whose customers are independent garage owners in the southern California area, who has been in that business for the last ten years, a resident of Los Angeles County for forty-two years, and the owner of a Volkswagen from 1958 to approximately four months prior to the trial, stated that his knowledge of the reputation of the authorized Volkswagen agencies in California for repair and service is "poor". The basis of his knowledge was predicated on his area of service, Ventura County, Riverside County, Orange County, and Los Angles County, together with his experience representing parts and sale houses for the last ten years in almost every city in the United States wherein he had heard comments relative to the Volkswagen reputation [RT 624, line 10, to 629, line 8].

Mr. James Lamprell, a flight engineer for Trans World Airlines, also the owner of a business serving as a buyers' agent arranging for the importation of new Volkswagen automobiles for individual buyers, a resident of southern California since 1947, and owner of three Volkswagen cars during the last three years prior to the trial, testified that his knowledge of the

general reputation of the authorized Volkswagen agencies in his community for repair and service rendered by them was "not good". His opinion was based not only upon the experience gained as a Volkswagen owner, but also as an importer of approximately 500 new Volkswagens in the last two years, and his discussions with the customers relative to the treatment they have received from the authorized Volkswagen agencies patronized by them [RT 446, line 11, to 459, line 15; 462, lines 15-18]. The area of general reputation encompassed by this witness extends as far south as San Diego, north to Newhall or Bakersfield and as far east as Riverside (Citation *Supra*).

At this point, Church presented another witness, Mr. Vincent Barasic, Jr., and at the request of the court, presented the following offer of proof: that Church was prepared to put approximately 300 additional witnesses on the stand to testify as to the general reputation of authorized Volkswagen agencies in the southern California area for repair and service rendered by them to the Volkswagen product line, that such reputation was not good; that approximately 80% of the witnesses were acquainted with Church, the remaining 20% were not acquainted with him; of those who are acquainted with him approximately 75% are his customers. In addition to the aforementioned testimony, the witnesses would testify as to the meaning of the word "INDEPENDENT", that it meant to them when they observed it in connection with the advertisement of a business, that the advertiser was not enfranchised by the manufacturer of the product and was independent in all respects from the manufacturer thereof. The court ruled that the defendant has produced sufficient witnesses to constitue a representative cross section of the kind of testimony that would be introduced and additional testimony would be

merely cumulative, to which an exception was taken [RT 655, line 24, to 666, line 20; 1111, line 21, to 1112, line 17].

Q. The Meaning of the Word "INDEPENDENT" and Its Unique Significance.

In connection with the meaning of the word "independent", as used in conjunction with the sale of a service or a product by a business enterprise, Mr. Lamprell testified that the word means that the advertiser is not connected in any way with the Volkswagen factory or with any of its agencies. In this regard he had referred to the example "AN INDEPENDENT VOLKSWAGEN SERVICE CENTER", or "YOUR INDEPENDENT VOLKSWAGEN SERVICE CENTER" [RT 460, line 21, to 462, line 7]. Mr. Emard testified that any business organization that advertises by using the word "INDEPENDENT" in connection with its business means that it is independent from any other organization, it is on its own, and it is not an enfranchised organization; with respect to Defendant's Exhibits, B-1, B-2, B-3, and Plaintiff's Exhibits 19b, 19c, 20, 21, 22, 23, 25, and 26, the advertising appearing thereon indicates that the advertiser is an independent organization, on its own, and not enfranchised by anyone, the exhibits referred to being those photographs representing the methods of advertising adopted by Church [RT 535, line 10, to 541, line 2].

Mr. Nakagawa testified with reference to Defendant's Exhibits, B-1, B-2, B-3, and Plaintiff's Exhibits 19b, 19c, 20, 21, 22, 24, and 25, that the advertising which appears therein indicates that the advertiser is not connected with the manufacturer of the product and that he is in business for himself [RT 547, line 17, to 551, line 15].

Mr. Robinson testified that he has seen the word "INDEPENDENT" used in connection with the advertisement of a business in many instances. It means to him that the business so advertising is operating independently from the factory, its agency, franchise, and is on its own and in business for itself. With reference to Defendant's Exhibits, B-1, B-2, B-3, and Plaintiff's Exhibits, 19b, 19c, 19d, 20, 21, 22, 25, 26, the advertisements appearing therein indicate that the advertiser is an independent individual who is operating the business, operating independently from any authorized Volkswagen agency, and, with particular regard to Defendant's Exhibits B-3, his feeling is emphasized because he does not see "AUTHORIZED", but sees "INDEPENDENT" [RT 554, line 25, to 558, line 10].

Mr. Schenk testified that he has seen the word "INDEPENDENT" used in connection with business advertisements, and it means to him that the advertiser is not enfranchised. He is not acquianted with Church and has never met or seen him before. He is not a customer of Church. With reference to Defendant's Exhibits B-1 and B-3, and Plaintiff's Exhibits 19b, 19c, 19d, 20, 21, 22, 24, 25, and 26, these exhibits indicate to him that the advertiser is an unauthorized, unenfranchised, garage or repair facility. With particular reference to Plaintiff's Exhibit 19b, the thing that indicates to this witness that it is an unauthorized facility is the word "INDEPENDENT" [RT 570, line 11, to 573, line 3].

Mr. Lewellyn testified that he has seen the word "INDEPENDENT" used in connection with business advertisements, and it means to him that the advertiser stands alone and is not connected with the industry that is represented in an official capacity [RT 588, line 16, to 589, line 5]. With reference to Defendant's

Exhibits B-1 and B-3, and Plaintiff's Exhibits 19b, 19c, 19d, 11h, 20, 21, 22, 23, 25, and 26, these exhibits indicate to the witness that the advertiser is not enfranchised by the manufacturer [RT 589, line 6, to 592, line 8]. This witness also testified, with reference to Plaintiff's Exhibits 70a and 70b, that there was nothing in those exhibits which would indicate that the advertiser is an authorized Volkswagen agency even though there is an encircled VW emblem in Exhibit 70a and there are Volkswagens in a showroom in 70b. He testified that it is evident from Exhibit 70b that the Volkswagens in the showroom are "used" and therefore it is not a Volkswagen Agency. The blue and white color combination alone does not distinguish an agency as being enfranchised, but the use of the blue and white Volkswagen emblem together with the sale of new Volkswagens indicates that it would be an authorized agency [RT 610, line 9, to 612, line 25]. With reference to Plaintiff's Exhibit 70c, this appears to be an authorized agency because it appears that there is a showroom containing new Volkswagens, and this was his only reason for his opinion. Although the use of the word "Volkswagen" would attract his attention, it would not be evidence to him that it was a Volkswagen agency unless it was selling new Volkswagen cars [RT 613, lines 1-17]. With reference to Plaintiff's Exhibit 70d, he testified this was not an authorized Volkswagen agency because he sees no Volkswagen sales room even though there appears to be a Volkswagen emblem on the premises [RT 613, line 24, to 614, line 16]. He further testified with reference to Defendant's Exhibits A-2, A-3, and Plaintiff's Exhibits 70e and 70f, that he could not tell from any of them whether they are authorized Volkswagen agencies because he can't see if there was a new car showroom on the premises [RT 615, line 11, to 618, line 25].

Mr. Lewellyn further testified that he had seen many Volkswagen agencies in his community, their color combinations are blue and white, that the distinguishing features of an authorized Volkswagen agency from those which are not authorized is that the authorized Volkswagen agencies sell new Volkswagens [RT 592, line 10, to 595, line 11].

Mr. Risdon testified that he has seen the word "INDEPENDENT" used in connection with business advertisements. It means to him that the advertiser is not affiliated with the manufacturer of the vehicle [RT 629, lines 9-22]. With reference to Defendant's Exhibits B-1 and B-3, and Plaintiff's Exhibit's 19b, 19c, 19d, 20, 21, 22, 24, 25, and 26, these exhibits indicate that the advertiser is not affiliated with the Volkswagen organization, and is independent from it. During the course of his travels around the southern California area he has seen approximately 25 to 30 Volkswagen agencies. In his travels throughout the United States in the last five years he has seen approximately 40 Volkswagen agencies. This makes a total of approximately 90 Volkswagen agencies which the witness has seen. The color combinations used by these agencies in general, on their premises, as well as on their signs, is blue and white. To his knowledge all of the Volkswagen agencies used the encircled VW emblem. The emblem is blue and white. He recalls seeing the Volkswagen mannequin on only two Volkswagen agencies. He recalls seeing the spread-out sign "VOLKSWAGEN" used on the agencies. The spread-out sign is blue and white. In California he has never seen a Volkswagen service or repair facility which is not connected with a new car sales agency. Volkswagen agencies stress the word "AUTHORIZED". He recalls seeing the word "AUTHORIZED" on the premises of each agency which he has seen, either

on the sign or on the building. Particularly, he has seen the sign emphasizing the word. "AUTHORIZED" on either a sign, *per se,* or on a building on the authorized agency premises [RT 629, line 23, to 635, line 16].

Mr. Risdon further testified that he was familiar with other business organizations using the word "INDEPENDENT" in connection with their name or in describing their premises. As an example he gave the "I.G.O." which means "Independent Garage Owners Association." When the witness sees the word "INDEPENDENT" used in connection with the name of a business, it means to him that it is not enfranchised by the manufacturer of the product, and by way of further explanation stated that authorized Volkswagen agencies are not "INDEPENDENT" within the meaning of this word [RT 647, line 15, to 651, line 10].

Not only do witnesses appearing on behalf of Church feel that the word "INDEPENDENT" means that the advertiser is not enfranchised by plaintiff or by any member of its family, but plaintiff's witnesses concur therein. Mr. Michael Sanyour, Jr., vice-president of plaintiff's United States importer, Volkswagen of America, interpreted the word "INDEPENDENT" as it appears in the title to Defendant's Exhibit J, namely, "STATEMENT OF POSITION FOR INDEPENDENT SERVICE AND REPAIR ENTERPRISES WITH RESPECT TO VOLKSWAGEN TRADE MARKS," as meaning "non-authorized" [RT 156, line 4, to 159, line 8; Deft. Exs. C and J].

Plaintiff's witness, Mr. Joseph Metz, zone service manager from Volkswagen of American assigned to the Volkswagen Pacific area consisting of southern Cali-

fornia, Arizona, South Nevada, and Hawaii, interprets the meaning of the word "INDEPENDENT" when used by non-enfranchised repair facilities as meaning *"not enfranchised"* [RT 354, line 10, to 355, line 8]. Mr. Metz also pointed out that there are no authorized Volkswagen dealers within the Volkswagen Pacific area who have the word "INDEPENDENT" as part of their name or who use the word to advertise on their premises [RT 353, lines 10-17]. Mr. Metz further pointed out that all authorized Volkswagen agencies within the Volkswagen Pacific area advertise that they are "AUTHORIZED" Volkswagen dealers [RT 344, line 22, to 346, line 22]; that the word "AUTHORIZED" means that the person using that word, whether it is in conjunction with sales, sales and service, or a dealership, is enfranchised by the manufacturer as a dealer [RT 349, line 23, to 350, line 6].

Plaintiff's witness, Samuel Weil, Jr., vice-president and general manager of Volkswagen Pacific, interpreted the word "INDEPENDENT" as follows:

> "If you're connecting it with Volkswagen specifically, it is generally speaking, 'unauthorized' because we use the term 'AUTHORIED VOLKSWAGEN DEALER,' usually." [RT 1102, line 25, to 1103, line 6].

In addition, and as an example of the extensive use over a very lengthy period of time by a trade association, both on a national basis and on a California state-wide basis, Church's witness, Mr. Tyerman, testified that he is a member of "Independent Garage Owners of California, Inc.", commonly referred to as "Independent Garage Owners"; he is the state secretary and director of the corporation. It is a California corporation with approximately 1000 businesss members. Only persons operating as independent re-

pair and service facilities may be members, so long as they are not connected in any way with the manufacturers of automobiles, and, in addition, there are exclusions by way of used car lot operators, etc. [RT 668, line 10, to 671, line 8; Pltf. Ex. 75]. The organization is 25 years old and has used the words "INDEPENDENT GARAGE OWNERS ASSOCIATION" for the entirety of its existence [RT 673, lines 16-24]. The California Corporation is affiliated with a national organization called "Independent Garage Owners of America", the "I.G.O.A.". Every member of the state organization is automatically a member of the national organization. The national organization has between 9000 and 10,000 business members throughout the United States. Referring to Defendant's Exhibit V-1, a book containing the names and addresses of all of the members of the California organization, which book is circulated among the members and is given by members to their customers who desire a reference to other independent garage facilities, the emblem appearing on the front page of the book is that used by the California Association for the greater part of the 25 years of its existence. It contains, in part, the wording, "INDEPENDENT GARAGE OWNERS OF CALIF. INC.". On the back of the book appears the emblem of the national organization which contains, in part, "INDEPENDENT GARAGE OWNERS OF AMERICA, INC." [RT 671, line 9, to 673, line 15; 676, line 22, to 677, line 21; Deft. Ex. V-1].

In addition to the book, Defendant's Exhibit V-1, the Independent Garage Owners Association uses a give-away floor mat bearing the emblem of the association and the wording aforementioned including the word "INDEPENDENT" [Deft. Ex. V-2]. It cir-

culates a trade newspaper presently entitled "AUTOMOTIVE INDEPENDENT," formerly the "I.G.O. NEWS," which has been published for at least fifteen years [RT 681, line 20, to 683, line 7; Deft. Ex. V-5].

Examples of classified advertisements of the Independent Garage Owners Association appearing in the classified section of the telephone directory were placed into evidence as Defendant's Exhibiti O-3, O-6, and O-9. The ads bear the shield of the Independent Garage Owners Association including the word "INDEPENDENT", and thereunder lists the members desiring to advertise in the particular directory. This has been a practice of the association for a number of years [RT 684, line 15, to 685, line 18; Deft. Ex. O-3, O-6, and O-9].

The Independent Garage Owners Association furnishes metal signs approximately two feet by two feet in dimension, which are distributed to the membership bearing the emblem of the association including, in part, the word "INDEPENDENT", which signs are displayed on the business premises of the membership. There are two types of signs, one bearing the shield of the national organization, and one bearing the shield of the California Independent Garage Owners Association. The shields are exemplified by the ones that appear on the front and back covers of Defendant's Exhibit V-1 [RT 690, lines 5-25].

Thus, the uncontradicted testimony of both defendant's witnesses and plaintiff's witnesses, together with the Defendant's Exhibit J, a flyer distributed *by plaintiff* and addressed to "INDEPENDENT SERVICE AND REPAIR ENTERPRISES" there seems to be no doubt but that the word "INDEPENDENT" when used in any form of advertisement by an automobile repair and service facility, either alone or in connec-

tion with other words, indicates that the advertiser is NOT enfranchised by the manufacturer of the motor vehicle or any member of its family.

R. Distinct Difference in Appearance of Church's Premises.

The visual appearance of the premises of plaintiff's family of authorized agencies is dramatically distinct and different from the visual appearance of Church's premises. A simple comparison of the color photographs of the front of Church's building, Defendant's Exhibit B-1, with the color photographs of several authorized Volkswagen agencies, Defendant's Exhibits A-1, A-2, A-3, A-4, and A-5, together with black-and-white photos of authorized Volkswagen agencies, Plaintiff's Exhibits 69a, 69b, 69c, 69d, 69e, 69f, 69g, will readily make apparent the difference. Further, it is urged that the court compare the color photographs of Church's truck and pole sign, Defendant's Exhibits B-2 and B-3, respectively, with the color photographs of the signs of authorized Volkswagen agencies, Defendant's Exhibits A-1 to A-5, inclusive, and in addition, compare the aforementioned color photograph of Church's truck with Plaintiff's Exhibit 69h, a black-and-white photo with an authorized Volkswagen dealer's truck in the foreground. It is further urged that the court compare Church's earlier pole sign and truck, reflected by Plaintiff's Exhibits 14, 15, and 16, with the authorized Volkswagen agency truck in Plaintiff's Exhibit 69h and with the sign appearing on the authorized agency's premises in Plaintiff's Exhibits 69a through 69g, inclusive, and Defendant's Exhibits (in color) A-1 through A-5. A comparison of the aforementioned photographs will reveal the difference in appearance between the little shop of Church and those of the Volkswagen family of authorized agencies. The size

and shape of the building is totally different, the color combinations are totally different, the phraseology and wording are totally different, the signs are totally different, there is no automobile sales agency operated in connection with Church's business; in fact, there is not one item of similarity which could remotely serve to confuse the public into believing that Church's premises and business is a member of the authorized Volkswagen family of agencies.

S. Control by Plaintiff Over Its Family, and Uniform Appearance of Family Premises, Signs and Forms.

Aside from the dramatic visual differences in the appearances of authorieed Volkswagen agencies and the appearance of Church's premises, plaintiff's family of authorized Volkswagen agencies are required by their franchise to display the word "VOLKSWAGEN" and other words and symbols, in such number and in such locations as may be directed by their distributor [Pltf. Ex. 6g, Art. 1, 4 (1)]. It is obvious from a reading of Plaintiff's Exhibit 4, the contract between plaintiff and its wholly owned United States importer, Volkswagen of America, Plaintiff's Exhibit 5a, a typical dealer agreement, 5b, 5c, 5d, and 5e, typical distributor agreements, and 6a, 6b, 6c, 6d, and 6e, typical dealer agreements, that plaintiff maintains absolute control over every movement of the entire family of Volkswagen representatives. Each and every member of plaintiff's family is a virtual robot subject to the complete control of plaintiff. Example of the control exercised by plaintiff over its family of authorized Volkswagen agencies is the testimony of plaintiff's witness, Mr. Christiensen, when he stated that the distributor would do something about it if the dealer maintained a color combination other than blue and white, adding, however, that such an occurence has never taken place [RT 320, lines 12-18].

Plaintiff's witness, Mr. Metz, whose duties include assisting authorized Volkswagen agencies to set up their premises in accordance with the requirements of plaintiff, testified that the color combinations for authorized Volkswagen signs are blue and white, as indicated by Plaintiff's Exhibit 68b [RT 203, lines 7-24]; referring to Plaintiff's Exhibit 68c, identified it as containing more of plaintiff's "recommendations" concerning blue and white color combination for signs [RT 232, line 19, to 233, line 5]; referring to Plaintiff's Exhibit 68d, identified this exhibit as showing "suggested" color schemes for Volkswagen dealerships [RT 237, lines 14-23]; testified that the Volkswagen emblems which appear in Plaintiff's Exhibit 69 series are blue and white [RT 242, line 14, to 243, line 2]; testified that all Volkswagen agencies used the blue and white color combination for the outside of their buildings [RT 326, lines 6-20]; that most of the authorized Volkswagen agencies in the Volkswagen Pacific area which have been franchised within the last five or six years are standardized as to the general shape and structure of their buildings [RT 326, line 21, to 327, line 1]; that he knows of *no* authorized Volkswagen agencies in the Volkswagen Pacific area that use color combinations other than blue and white [RT 327, lines 5-21]; and that he knows of no instance where an authorized Volkswagen agency in the Volkswagen Pacific area has used a color combination other than blue and white in their shop signs [RT 327, line 24, to 328, line 6]. In addition, Mr. Metz testified that prior to January, 1965, no authorized Volkswagen agency known to him utilized the word "VOLKSWAGEN" as part of its business name [RT 328, line 16, to 331, line 3]. Mr. Metz is fully qualified to testify as to the standard Volkswagen agency appearance in the United States because one of his duties is to insure that new buildings

In addition to the visual presentation made by the physical appearance of the premises of an authorized Volkswagen agency, the method of advertising adopted by the authorized Volkswagen agencies in the southern California area in the classified section of the telephone directory as well as their newspaper ads, is somewhat standardized and distinct from the classified telephone ads and newspaper ads utilized by Church and by the numerous other independent Volkswagen service and repair centers. Defendant's Exhibit L-1, a newspaper ad placed by the authorized Volkswagen agency in Church's area, Circle Motors, is distinct in its use of the encircled VW emblem, and the wording "AUTHORIZED VW DEALER"; Defendant's Exhibit L-2 is a classified ad of an authorized Volkswagen agency in Church's area, Ricketts Motors, which ad is also distinct in its use of the encircled VW emblem and the phraseology "AUTHORIZED VOLKSWAGEN AND PORSCHE DEALER FOR THE LONG BEACH—HARBOR AREA"; Defendant's Exhibits L-3 and L-5 are ads of another Volkswagen agency in Church's area, Lakewood Motors, and are similarly distinct in their use of the encircled VW emblem and the phraseology "YOUR FACTORY AUTHORIZED VOLKSWAGEN DEALER"; Defendant's Exhibit L-4 is a classified ad of another authorized Volkswagen agency, Downtown Motors, and again is distinct in its use of the encircled VW emblem; Defendant's Exhibit L-6, is a page from the classified section from the Los Angeles Times showing how several authorized Volkswagen agencies advertise through the use of the phraseology "AUTHORIZED VW DEALER" (placed by Lee Wissler Volkswagen), "AUTHORIZED VOLKSWAGEN AND PORSCHE DEALER" (placed by Neil Compton Motors), "AUTHORIZED VW PORSCHE"

(placed by Precision Motor Cars), "AUTHORIZED VW DLR." (placed by Ogner Bros.); Defendant's Exhibit L-7, a list of authorized Volkswagen agencies containing, again, the use of the encircled VW emblem together with the wording, "Only an authorized VW dealer can sell you a new Volkswagen."

By comparison with the defendant's L series of exhibits, an examination of the defendant's O series reveals the contrast of methods of advertisement. Defendant's Exhibit O-1, a newspaper classified ad in the Los Angeles Herald Examiner shows an independent facility advertisement, Beetle Imports, that advertises with the phraseology "INDEPENDENT VW SALES & SERVICE", the ad also being considerably smaller than that of the authorized agency; Defendant's Exhibit O-2, being a series of classified telephone ads of independent repair and service facilities in the Orange County and Los Angeles County areas, noting that in nearly all instances the independent facility used the silhouette of a Volkswagen, amongst other cars, and several used the phraseology, "factory trained mechanics", "factory trained German mechanic", "VW-Porsche parts & service exclusively", and many used the word "Volkswagen" with emphasis thereon; Defendant's Exhibit O-4, a classified telephone ad showing an authorized Volkswagen agency ad using the phraseology "AUTHORIZED VOLKSWAGEN SALES—SERVICE—LEASING," placed by Kendon Motors; Defendant's Exhibit O-4, a classified telephone ad placed by two authorized Volkswagen agencies in Church's area, Lee Carpenter, Inc., in Compton, and Lakewood Motors, in Lakewood, both of which used the encircled VW emblem and the phraseology "AUTHORIZED VOLKSWAGEN IN COMPTON", and "AUTHORIZED DEALER"; Defend-

ant's Exhibit O-5, a classified telephone ad of an independent repair and service facility, Franze's Garage, in El Monte, utilizing the silhouette of a Volkswagen, and the ad of another independent Volkswagen facility, Karl's Garage in Covina, utilizing the silhouette of a Volkswagen and the phraseology "AN INDEPENDENT VOLKSWAGEN & PORSCHE SERVICE CENTER", the latter being on the same page as that of an authorized Volkswagen agency, Harry Hill Motors, Inc., in West Covina, utilizing the encircled VW emblem and the phraseology "ONLY AUTHORIZED VOLKSWAGEN AGENCY IN THIS AREA"; Defendant's Exhibit O-7 containing a joint ad by two authorized Volkswagen agencies in the Long Beach area, as well as a distributor ad utilizing the encircled VW emblem; Defendant's Exhibit O-8, a classified telephone ad of an independent Volkswagen facility, Speedway Motors, utilizing the silhouette of a Volkswagen, the phraseology "AN INDEPENDENT VOLKSWAGEN & FOREIGN CAR SERVICE CENTER", and "GERMAN TRAINED VOLKSWAGEN MECHANICS", which exhibit also includes an ad from an authorized Volkswagen agency in Santa Monica, Ralph Cutright Co., containing the phraseology "BAY AREA AUTHORIZED DEALER VOLKSWAGEN-PORSCHE SALES-SERVICE-PARTS."

As can be seen from the numerous classified advertisements in evidence, the lines of distinction are clear. The authorized Volkswagen agencies using the terminology "AUTHORIZED" and the encircled VW emblem, and the independent facilities using the wording including "INDEPENDENT", the silhouette of a Volkswagen, with an important aspect being the *absence* of the word "authorized" and the encircled VW em-

blem. In many instances, also, the independents advertise that they repair other brands of foreign autombiles other than Porsche, which in itself, distinguishes them from the authorized Volkswagen agencies.

U. "Volkswagen Service" Is Descriptive and Not Proprietary.

The uncontradicted evidence clearly establishes that the words "Volkswagen Service" means nothing more than that the advertiser services Volkswagens, and it does not indicate that the advertiser is either authorized or unauthorized. It does not give anyone a clue that the service is being provided by an authorized dealer. The viewer would have no way of knowing by seeing merely those two words [RT 601, line 13, to 602, line 6]. There is no evidence to the contrary. It is inconceivable that the terminology "Volkswagen Service", or "Volkswagen Repair", or "Volkswagen Repair & Service", or "VW Service," or "VW Repair & Service," could mean anything other than a description of the nature of the service or repair rendered, *i.e.,* that the person displaying such phraseology services and/or repairs Volkswagens. The terminology is purely descriptive and not proprietary.

All one need do is to drive up and down the streets of any community and look at the advertisements of various types of automobile repair and service facilities. Such an observation would reveal that Volkswagen is not the only one that advertises by use of the terminology, in part, "SERVICE". Examples of what might be found would be: "VOLKSWAGEN REPAIR", or MG SERVICE", "JAGUAR SERVICE", "MERCEDES BENZ SERVICE", "PORSCHE SERVICE", and any one of the multitudes of different

car names in connection with the word "service" or "repair" as well as the statement "auto repair" or "auto service", used by facilities that do not specialize. It is inconceivable that in the total absence of evidence to support its position plaintiff herein seeks to obtain an exclusive right in the terminology "Volkswagen Service", or Volkswagen Repair".

IV.

COMMENTS ON PLAINTIFF'S "SPECIFICATION OF ERRORS RELIED UPON".

A. Specification I.

It is not contended by Church that his use of the word "Volkswagen" as part of his business name in 1958 and part of 1959 was proper. However, such use was terminated in 1959 [RT 869, line 6, to 871, line 10; RT 871, lines 11-17; Pltf. Ex. 13]. For approximately five years after he changed his business name, each and every use by Church of the word "Volkswagen" or the initials "VW" have been a denotive sense and not susceptible to public confusion or deception. It is within the exclusive purview of the trial court to determine issues of fact, which determination should not be reversed except in the absence of a scintilla of evidence to support the finding. Here, a simple examination of the exhibits clearly support the trial court's finding that none of the practices of Church enumerated in the findings, individually of collectively infringe any of the rights of plaintiff [Compare Deft. Exs. B-1, B-2, B-3, F, N, G,; Pltf. Exs. 11a through 11g, 14, 15, 16, 17, 18, 19a through 19d, 20, 21, 22, all of the foregoing being exhibits of Church's practices, with Deft. Exs. A-1 through A-5, L-1, through L-5, M-1, M-2; Pltf. Exs. 69a, 69c, 69d, 69f, 69g, 69h, 69i, 69j, 69k, being exhibits of au-

thorized Volkswagen agence premises, signs, and related material. Also, compare the foregoing with Deft. Exs. O-1 through O-14, L-6, L-7, Q, R, S, T, U, I, V-1 through V-5, being exhibits concerning other independent repair and service facilities and advertisements of both authorized and independent facilities]. In this specification the conclusion of law is based upon a wealth of facts in evidence.

B. Specification II.

The trial court found that the use by Church of the quoted terminology in this specification was "denotive" and not, as plaintiff erroneously contends, proprietary. Again, an examination of the exhibits listed above when taken in their respective entireties and not merely as words written on a piece of paper, support the position of the trial court [See particularly Deft. Exs. B-1, B-2, B-3, F, N, G, and Pltf. Exs. 11a through 11g, 14, 15, 16, 17, 18, 19a through 19d, 20, 21, and 22].

C. Specification III.

The evidence was uncontradicted that the meaning of the wording "Volkswagen Service " and "VW Service" indicates nothing more than that the advertiser services Volkswagens. It does not indicate that the user is "authorized" or "independent" [RT 601, line 13, to 602, line 6]. An additional 300 plus witnesses would have similarly testified had the trial court permitted [RT 655, line 24, to 666, line 20; RT 1111, line 21, to 1112, line 17]. Thus, the trial court properly found that such terminology was denotive and not proprietary.

D. Specification IV.

In this satisfaction plaintiff suggests that Church failed to discharge the affirmative duty to take "rea-

sonble" precautions to avoid public confusion. The record adequately supports the position taken by the trial court in view of the express language adopted by Church in connection with his telephone classified ads [Pltf. Exs. 11c through 11g; Deft Ex. F]; the size, shape and color combinations on his building [Deft. Ex. B-1]; the size, shape, color combinations, and content of his pole sign [Deft. Ex. B-2; Pltf. Exs. 14 and 15]; his give-aways [Pltf. Exs. 21, 22, 24, 25, and 26]; and repair order forms [Pltf. Ex. 18]. Not only did Church use denotive wording ("Volkswagen Repair", "VW Service", etc.), but went a step further to aid the public in locating an *independent* Volkswagen and Porsche service center.

E. Specifications V and IX.

These specifications are related and may be answered as a unit. Church, at the request of plaintiff, changed his business name to "Modern Specialist" [RT 871, line 22, to 872, line 3]. This alone, is an example of Church's willingness to act so as not to infringe upon the rights of plaintiff, and, further, demonstrated good faith. The fact that over the several years that elapsed prior to the filing of this action in mid-1964, Church did not change his non-offending business name evidences an intent to avoid future violative conduct.

In addition to the above, he adopted a basic banner "AN INDEPENDENT VOLKSWAGEN & PORSCHE SERVICE CENTER" and prominently desplayed same in his classified telephone book ad. His give-aways all bear similar language.

Lastly, although he was certainly not required to do so, he removed the word "Volkswagen", from his pole sign, and replaced the word "Modern" with the word "Independent" on the sign over his garage doors.

These two changes were made at about the same time that this action was filed, but are in no way concessions that the prior signs were legally offending. They were merely additional acts by Church to placate plaintiff.

F. Specification VI.

An examination of the two napkins in evidence will demonstrate the color and content differences. Compare the example of a napkin used by authorized Volkswagen agencies [Pltf. Ex. 69i] with that used by Church [Pltf. Ex. 24].

G. Specification VII.

By this specification, plaintiff would have the court conclude as a matter of law that plaintiff has the exclusive right to the use of "blue and white" color schemes, "or Memphis Bold style of lettering". The quotation herein is in the disjunctive (by use of the word "or") and not conjunctive. Plaintiff fails to realize that the law requires the trier of fact to look at the entirety of each act alleged to constitute a trademark infringement or an act of unfair competition, and not limit its investigation to (1) the colors used, or (2) the style of print. If an independent Volkswagen repair shop painted its building black, but used Memphis Bold style type on its sign to scribe its business name "Bill's Auto Repair", this would be a violation *per se* of plaintiff's rights under plaintiff's theory. Similarly, if an independent Volkswagen repair shop painted its building navy blue with white trim, using the business name, "John's Repair Shop" in other than Memphis Bold style type (and not confusingly similar thereto), he would be in violation *per se* under plaintiff's theory, even though the word "Volkswagen" or the initials "VW", or any other indicia of speciality did

not on the premises. Lastly, even if "John's Repair Shop" used Memphis Bold style print without any other indicia of specialty (*i.e.*, conjunctive use), it is inconceivable that a violation *per se* would exist.

These examples merely point out the error of plaintiff's position in this specification.

The test has already been set out in the first few paragraphs of II, above. See *Dodge Bros. v. East, supra, Ford Motor Co. v. Boone, supra,* and *Ford Motor Co. v. Helms, supra.*

H. Specifications VIII, X, and XI.

These specifications of error would only be valid if the facts in evidence were other than as they are. Church has no comment in regard to these specifications except to state that the issuance of injunctive relief is discretionary with the trial court, and, absent grounds warranting issuance, should not be levied.

Summary.

Historically, and to date, the use of the word "INDEPENDENT" in connection with business advertisements has come to have an independent significance. The word "INDEPENDENT" indicates that the advertiser is in no way enfranchised by the manufacturer of the product. Similarly, the word "AUTHORIZED" has come to have an independent significance and indicates that the advertiser is enfranchised by the manufacturer of the product.

The advertisements adopted by Church in the instant case, exemplified by his classified telephone directory ad stating that he is "AN INDEPENDENT VOLKSWAGEN & PORSCHE SERVICE CENTER" clearly spells out the fact that he is not enfranchised by the manufacturer of either Volks-

wagen or Porsche. Looking at that advertisement, and deleting the words "Volkswagen" and "Porsche", the phraseology would be "AN INDEPENDENT SERVICE CENTER". This terminology simply indicates that the advertiser, in the instant case "Modern Specialist," is an unenfranchised service center not specializing in the repair of any particular make of car. The addition of the words "VOLKSWAGEN" and "PORSCHE" merely add to the advertisement that the unenfranchised service center specializes in the repair of Volkswagen and Porsche cars. Whether the word "VOLKSWAGEN" is used in the advertisement or the initials "VW" makes no difference, since the same meaning is present. Similarly, whether the explanation commences with the word "AN" or "YOUR" makes no difference because the meaning would not be changed. The fact that Church in the instant case had adopted the terminology "SERVICE CENTER" may aggrevate the plaintiff because it implies that the advertiser, Modern Specialist, is an unenfranchised "center" for service to plaintiff's product line, is of no consequence. Plaintiff must stand up under the fair competition of its independent competitors, even though it may not like competition.

Historically, plaintiff's family of authorized Volkswagen agencies have used the word "VOLKSWAGEN" in a thirty seven foot spread-out sign in blue and white Memphis Bold letters across the front of their premises. Factually, the length of the sign would depend upon the available space which would be governed by the length of the building front. In any event, the testimony is unquestionable in this regard, and, in addition, Volkswagen agencies use the encircled VW emblem and the word "AUTHORIZED" to designate their identity as enfranchised representatives of plaintiff. All of the Wolkswagen agen-

cies in the Volkswagen Pacific area (Southern California, southern Nevada, Arizona, exluding Hawaii—for some reason plaintiff did not care to include Hawaii in its testimony), use only the blue and white exterior color combinations, the blue and white signs, and the blue and white emblems. No other color combination is used within this area. Similarly, nowhere in the United States is there an authorized Volkswagen repair and service facility which is not operated in connection with a new car sales agency. All enfranchised Volkswagen agencies have new car sales rooms, and, in addition, used car facilities. Plaintiff's family is not under an affirmative duty to use the word "AUTHORIZED" or the encircled VW emblem, though it has historically done so and created the image in the public's mind, but if the agencies do not so use, they run the risk that the public will think the non-user is an independent.

In the instant case, Church does not use the blue and white color combinations on his building, his signs, or in his classified telephone directory ads, repair order forms or plastic litter bag. The give-aways which he uses, the ballpoint pen and pencil, the matchbook covers, and the paper napkins, have blue lettering on a white background. However, plaintiff has no exclusive rights to this color combination alone. The qualifying wording which appears on the give-aways, clearly spell out that Church is an independent Volkswagen service facility. Each such exhibit in evidence must be weighed as an independent whole. Why are the photographs which plaintiff has introduced into evidence as showing the premises of authorized agencies in black and white instead of color? Apparently, plaintiff does not wish to emphasize the fact that there is a great difference in appearance between the authorized

agency premises, signs and trucks, and those of Church. Without a color comparison, the court is deprived of valuable evidence.

In "PLAINTIFF'S PRE-TRIAL MEMORANDUM OF POINTS AND AUTHORITIES" [CT 232, page 23, lines 13-16] plaintiff states "when he (Church) features the car in his advertising, he is as surely infringing plaintiff's trademark as he would be if he featured the word "Volkswagen" *alone and in isolation."* (Emphasis added). With this contention, Church cannot disagree. However, it is obvious from an examination of all of the exhibits, that Church does not use the word "Volkswagen", nor the silhouette of a Volkswagen, *"alone and in isolation."* Thus, adopting the converse of the quoted statement—if the word or silhouette were not used alone or in isolation, no infringement would be present, each and every advertisement which has been used by Church for several years prior to the institution of this lawsuit has not constituted unfair competition to plaintiff.

At the most, Church's business name adopted in 1958 and used for approximately one and a half years, "Modern Volkswagen & Porsche Service", might have infringed upon plaintiff's trade name. This would be so because Church used the word "Volkswagen" not in a denotive sense but rather in a proprietary sense as part of the name of his business. However, when the matter was brought to his attention by plaintiff, and after the negotiations between the various attorneys involved, Church promptly changed the name of his business to "MODERN SPECIALISTS". He changed the name in his classified telephone directory advertisement, on his repair order forms, on the side of his truck, and in all other places where the prior name of his business had been displayed. The objec-

tionable business name has not been used by Church since 1959.

Plaintiff has objected to the use of the word "Volkswagen service," but nowhere does Church use those words alone. He does advertise "Volkswagen Porsche service," and has so advertised on the side of his truck since he changed the name of his business. After plaintiff persisted in harassing him, he added the word "INDEPENDENT" on his truck so that it has read "INDEPENDENT VOLKSWAGEN PORSCHE SERVICE" for over a year prior to the institution of the instant lawsuit.

At no time has Church used the encircled VW emblem. Further, at no time has Church used Memphis bold type in any advertisements, nor any type substantially similar thereto.

The court has the discretion in issuing an injunction. In the various Volkswagen cases cited by plaintiff, the courts have issued injunctions. In each case, however, the defendant was involved in the sale of the Volkswagen product line and committed gross abuses right up to the time of trial, and, presumably, until the injunctions were issued. In the instant case, however, the only possible act of unfair competition committed by Church was that of including in his initial firm name the word "Volkswagen" in 1958 and part of 1959, over four years prior to the institution of this lawsuit. Church has, therefore, demonstrated his good faith and intentions for several years, presenting a factual circumstance to the court justifying the denial of an injunction.

The test which the court should apply in examining any of the exhibits in evidence comprising advertisements used by Church should be that of the average prospective customer. Church does not have to adver-

tise in such a manner as to preclude "everyone in the world" from possibly making an error in determining whether he is enfranchised by plaintiff. Church need only advertise in a manner which is reasonably designed to prevent the likekihood of public confusion.

Church does not care to capitalize on the reputation of plaintiff, since that reputation in the Southern California area for the repair and service rendered by plaintiff's authorized family of Volkswagen agencies is not too savory. Plaintiff's reputation for manufacturing a cheap, popular car is excellent. The success of Church in his business has been built around the good service and repair rendered by him to the vehicles manufactured by plaintiff. There have been no instances of public confusion regarding any of the advertisements adopted by Church, *including* the only possible infringing conduct of Church when he included the word "Volkswagen" in his business name back in 1958. Although the lack of public confusion is not to be given a great deal of weight, it is evidence thereof and should be considered by the court.

It is also reasonable to believe, in view of the testimony of Mr. Weill, Executive Vice-President of Volkswagen Pacific, Inc., that due to the great number of complaints received by him concerning service and repair rendered by *authorized* Volkswagen agencies in the Volkswagen Pacific area, that a good deal of Church's success has been the result of *the public's desire to seek out independent repair and service facilities and patronize them.* If this is true, and we have every reasonable right to believe that it is, then it would be a *disservice to the public* to not permit Church to advertise that he is "AN INDEPENDENT VOLKSWAGEN AND PORSCHE SERVICE CENTER." The public is entitled to have a selection.

Plaintiff would prefer that the only selection presented to the public be as between authorized Volkswagen agencies. This would be contrary to the public policy which encourages fair competition.

Whether the court adopts Federal Law or California State Law makes very little difference, since both are the same with the exception of the incontestability provisions found in the Federal Law of Trademarks.

Conclusion.

For the foregoing reasons, Church respectfully requests that this court uphold the judgment of the trial court.

November 29, 1967.

Respectfully submitted,

ROBERT N. CLEAVES,
Attorney for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT N. CLEAVES

No. 22071

United States Court of Appeals
For the Ninth Circuit

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Appellant,

against

DOUGLAS D. CHURCH, doing business as
MODERN SPECIALIST,
Appellee.

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3 Callman, Unfair Competition and Trade-Marks, section 80.2, p. 1364 (2d ed. 1951) 6

87 C.J.S., Trade-Marks, etc., sections 78, 99 (1954) 6

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No. 22071

United States Court of Appeals

For the Ninth Circuit

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Appellant,

against

DOUGLAS D. CHURCH, doing business as MODERN SPECIALIST,
Appellee.

REPLY BRIEF FOR APPELLANT

In his answering brief Church recognizes that the public would be disserved by denying it the right to select the service facilities it desires to patronize: members of the authorized Volkswagen organization or outside repair shops like his own (Ch. Br. 73-74).* But the public can exercise that right intelligently only if it is able to discriminate and to distinguish factory-authorized service from unauthorized repairs. And as Church's answering brief makes plain, what he is insisting upon the right to do, and what he claims the decision below sanctions, is to advertise the availability at his premises of "Volkswagen Service" and "VW Service," the very phrases which traditionally identify the services sold under plaintiff's aegis. In short, he wants far more than the right to describe himself as "An Independent Volkswagen and Porsche Service Center." Thus the issue raised by this appeal is whether Church and hundreds of garages like him may continue to draw

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* "Ch. Br." means "Brief for Appellee"; "VW Br." refers to "Brief for Appellant." All the other initials and abbreviations are the same as in our prior brief. As before, defendant-appellee will be referred to herein as "defendant," and plaintiff-appellant as "plaintiff."

patrons to their premises by representing to the public that "Volkswagen Service," will be found there or whether this Court will disapprove the result reached below and require Church's signs and advertising clearly to distinguish his facilities from those which provide services controlled in their nature and quality by plaintiff.

I.

Church's Answering Brief Blurs the Facts and Misapprehends the Law.

In our opening brief we developed why, as a matter of law, the court below erred, in view of its own findings, in dismissing plaintiff's complaint. In his answer defendant rewrites whatever in the record he cannot defend. Similarly, he avoids grappling with our legal arguments by substituting a wholly different set of governing principles derived from inapposite authorities.

Typical of his disregard for whatever is awkward in the record is his treatment of "Modern Volkswagen Porsche Service." After admitting that this trade name might have infringed upon plaintiff's rights, his brief continues:

> "This would be so because Church used the word 'Volkswagen' not in a denotive sense but rather in a proprietary sense as part of the name of his business. However, when the matter was brought to his attention by plaintiff, and after the negotiations between the various attorneys involved, Church promptly changed the name of his business to 'Modern Specialists'. He changed the name in his classified telephone directory advertisement, on his repair order forms, on the side of his truck, and in all other places where the prior name of his business had been displayed. *The objectionable business name has not been used by Church since 1959*" (Ch. Br. 71-72) (Emphasis added).

Contrast this bland statement with the findings of the court below:

> "15. After defendant, in 1960, formally altered his trade name to 'Modern Specialist,' he continued to use his former appellation prominently in his business.
>
> "16. Until some time subsequent to the filing of the complaint herein, the designation 'Modern Volkswagen Porsche Service' dominated his building being stretched across its facade in large, black letters running the full width of his premises" (CT 146).

Regarding his truck, defendant writes that before it was repainted in 1963 to meet plaintiff's protests, "the name of Church's business 'Modern Specialist' [was] prominently displayed on the vehicle together with the wording 'Volkswagen-Porsche Servicing'" (Ch. Br. 35). In fact, as the court below found, the truck "carried in prominent letters against a white background, the inscription 'Modern Volkswagen Porsche Service.' Defendant's registered trade name 'Modern Specialist' was reproduced in smaller characters on the truck's door" (CT 146).

Just as defendant ignores the facts upon which we base our appeal, so does he disregard statutory and decisional trademark law. The legal argument with which he opens his brief (Ch. Br. 6-8) does not rely on a single precedent dealing with the question which is central to this case, and that is, what limitations the law imposes upon a third party's use of a valid and strong trade and service mark of the character owned by plaintiff.* On the contrary, in many of the cases cited by defendant, the court was at pains to point out that no issue of trademark infringement

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* One of the cases cited by defendant, *Sunbeam Furniture Corp.* v. *Sunbeam Corp.*, 191 F.2d 141 (9th Cir. 1951), does involve a valid trademark, but the opinion is employed by defendant only as authority for the limitations the courts impose on the protection they will give a trade name (Ch. Br. 7).

was raised. *E.g., Scudder Food Products, Inc.* v. *Ginsberg,* 21 Cal. 2d 596, 598, 134 P.2d 255, 257 (1943).

Four of the authorities invoked by defendant involve copying a product's appearance or trade dress,* a fifth concerns copyright.** All but a few of the balance deal with imitation of a trade name and without exception the plaintiffs in these cases were unsuccessful because the name was geographic or descriptive or weak, or the imitator was using his given name which could not be denied him.***

In only four of the cases relied on by defendant was a trademark even claimed. One decision can be put aside because this aspect of the opinion is not what interests defendant.**** In none of the remaining three was the right to protection recognized, either because the alleged trademark was in common use in the trade,***** or the word relied on as distinctive was descriptive and necessarily available to the whole world.******

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* *Audio Fidelity, Inc.* v. *High Fidelity Recordings, Inc.,* 283 F.2d 551 (9th Cir. 1960); *Haeger Potteries, Inc.* v. *Gilner Potteries,* 123 F. Supp. 261 (S.D. Cal. 1954); *Sunlite Bakery* v. *Homekraft Baking Co., Ltd.,* 119 Cal. App. 2d 148, 259 P.2d 711 (1953); *Scudder Food Products, Inc.* v. *Ginsberg, supra,* 21 Cal.2d 596, 134 P.2d 255 (1943).

** *Columbia Pictures Corp.* v. *National Broadcasting Co.,* 137 F. Supp. 348 (S.D. Cal. 1955).

*** *Rixford* v. *Jordan,* 214 Cal. 547, 6 P.2d 959 (1931); *Fidelity Appraisal Co.* v. *Federal Appraisal Co.,* 217 Cal. 307, 18 P.2d 950 (1933); *Schwartz* v. *Slenderella Systems of California, Inc.,* 43 Cal.2d 107, 271 P.2d 857 (1954); *Alhambra Transfer & Storage Co.* v. *Muse,* 41 Cal. App. 2d 92, 106 P.2d 63 (1940); *D. & W. Food Corp.* v. *Graham,* 134 Cal. App. 2d 668, 286 P.2d 77 (1955); *Sunbeam Furniture Corp.* v. *Sunbeam Corp., supra,* 191 F.2d 141 (9th Cir. 1951).

**** *Sunbeam Furniture Corp.* v. *Sunbeam Corp., supra,* 191 F.2d 141 (9th Cir. 1951).

***** *Castle* v. *Seigfried* 103 Cal. 71, 37 P. 210 (1894).

****** *Purity Springs Water Co.* v. *Redwood Ice Delivery,* 203 Cal. 286, 263 P. 810 (1928) ("water"); *Italian Swiss Colony* v. *Italian Vineyard Co.,* 158 Cal. 252, 110 P. 913 (1910) (the Italian word "tipo").

Patently none of these opinions is in point or provides any guidance here. This case is controlled by the statutes and decisional law in the trademark field. A handful of authorities from this area are recognized by defendant in a section headed "The Applicable Law" (Ch. Br. 8-13) following his opening point. There, he informs this Court, which decided *Ford Motor Co.* v. *Benjamin E. Boone, Inc.*, 244 Fed. 335 (1917), that *Dodge Bros.* v. *East*, 8 F.2d 872 (E.D.N.Y. 1925), is the "leading case" in this area. He then drops from his four-page discussion of this single authority (Ch. Br. 9-12) the fact that it condemned unequivocally as wrong the use of the "words 'Dodge Service' and 'Dodge Service Station.' " 8 F.2d at 877.

Defendant ducks the facts and misapprehends the law because he realizes that he cannot otherwise defend the result reached below.

II.

How Church's Service Compares in Quality or Reputation with "Volkswagen Service" Is Neither in Issue nor Relevant.

A fair portion of defendant's answering brief is devoted to setting forth at length the evidence he introduced to prove that in his community the reputation of the services sold under plaintiff's marks is not good (Ch. Br. 43-46). Almost equal attention is devoted to demonstrating that his service is equal or superior to that rendered by members of the Volkswagen family (Ch. Br. 40-41).

Neither relative reputation nor quality has any relevance to plaintiff's right to exclude anyone but itself and its licensees from employing its marks. Whatever the reputation of the services sold under the "Volkswagen" mark, its guardianship belongs to plaintiff alone. *Yale Electric Corp.* v. *Robertson,* 26 F.2d 972, 974 (2d Cir. 1928). It follows that it is no defense, even if it were true, that

defendant's reputation or services are equal to or better than those of plaintiff. 3 Callman, *Unfair Competition and Trade-Marks*, section 80.2, p. 1364 (2d ed. 1951); *Henry Perkins Co.* v. *Perkins*, 246 Mass. 96, 99, 140 N.E. 461, 462 (1923); 87 C.J.S., *Trade-Marks, etc.*, sections 78, 99 (1954). Whatever the facts, defendant may not share the benefits or take on the claimed disadvantages of plaintiff's reputation.

> "It is no answer to the charge of using a false and simulated brand that the article covered by the brand is of a superior quality to that which the purchaser desired to buy. You may not deceive a purchaser for his own benefit. The public will not be permitted to be deceived even for their own good. A purchaser has a right to buy the particular article he desires, and to be protected in the purchase." *Pillsbury* v. *Pillsbury-Washburn Flour Mills Co.*, 64 Fed. 841, 848 (7th Cir. 1894).

Regardless whether Church's services are good or bad, plaintiff wants back the sole custody of its good will. But the fact that no complaints concerning defendant have been received by the Volkswagen organization, to which Church attaches great importance (Ch. Br. 41-42), in no way negates dissatisfaction.

To begin with, it is the rare patron that engages in extended correspondence regarding unsatisfactory service. The more usual course is simply to shift patronage. Consumer dissatisfaction shows up in lost sales, not in letters. Moreover, as far as Church is concerned, by the time a customer cared enough to ascertain to whom complaint should be made regarding an authorized Volkswagen facility, he probably would have learned that Church was not part of the Volkswagen family, making any protest futile and useless. Even less likely would be communications regarding the sole matter central to this proceeding, which is the belief induced in customers by Church's signs and advertising regarding his connection with the Volkswagen

organization. Many patrons may never have realized that he was not part of that organization and anyone who learned the truth, after first being misled, would not be likely to sit down and advertise how he had been duped.

As specious as the argument predicated on the quality of Church's service, an issue neither raised nor decided by the court below, is that based on the testimonial evidence adduced by defendant regarding the local reputation of "Volkswagen Service" (Ch. Br. 43-46). So little confidence does Church himself have in this proof that he proposed no findings whatever predicated upon it (CT 154-164, 166-173).

Defendant's renewed attack upon plaintiff's reputation has no purpose other than to muddy the waters and prejudice the Court. As Judge Learned Hand pointed out in a similar context:

> "[S]ince, as usual, the defendant extolls its own wares and decries the complainant's there ought to be no ground for protest at any measures designed to avoid a confusion which must be disastrous to the defendant's reputation and its trade. It should welcome anything, which, while it preserves its own chosen title in full, will serve to advise the public that they must not confound its superior goods with the complainant's." *L. E. Waterman Co.* v. *Modern Pen Co.*, 193 Fed. 242, 247 (S.D.N.Y. 1912), *modified*, 197 Fed. 534, 536 (2d Cir. 1912), *aff'd*, 235 U.S. 88 (1914).

In fact, defendant, carried away by his own rhetoric, states flatly that he "does not care to capitalize on the reputation of plaintiff, since that reputation in the Southern California area for the repair and service rendered by plaintiff's authorized family of Volkswagen agencies is not too savory" (Ch. Br. 73). That being the case, why is he opposing the relief requested in this proceeding? Obviously, because, despite his disclaimer, he wishes to capitalize on the reputation he so vociferously denies.

III.

That Plaintiff's Licensees in Defendant's Locale Describe Themselves as "Authorized" or That Many Share a Common Trade Dress Does Not Exculpate Defendant of Infringement.

Defendant lays great stress in his brief before this Court, as he did below, on how members of the authorized Volkswagen organization can be identified as such by the public, in addition to the fact that they display the "Volkswagen" trademark (Ch. Br. 55-63). He points out that many occupy distinctive facilities (Ch. Br. 56-58); that all sell new cars (Ch. Br. 70); that they display not only the "Volkswagen" mark but the encircled VW emblem as well (Ch. Br. 58); that, in his area, they commonly identify themselves in their advertising as "authorized" (Ch. Br. 60-61); and fifty per cent use "authorized" on their invoices (Ch. Br. 59). Accordingly, he claims, he does not invade plaintiff's rights when he does business under the "Volkswagen" trademark (Ch. Br. 65-66, 69-70). His argument is factually and legally unsound.

The findings and the record show that his argument builds on half truths and issues resolved against him. The court below specifically found that a "substantial number" of older Volkswagen dealerships are not "distinguishable by their mere physical facilities, size, style or coloring of lettering, from the establishments of unfranchised businesses dealing with the sale or repair of Volkswagens" (CT 143-44).

Use of the word "authorized" is, as defendant himself concedes, a local phenomenon (Ch. Br. 22). In national advertising the general practice, as the court below found, "is to use the trademark 'Volkswagen' or its trademarked abbreviation 'VW' to identify services performed by the authorized domestic Volkswagen organization and to refer to such services simply as 'Volkswagen Service' or 'VW Service' " (CT 142).

Even locally, use of the word "authorized" is confined to advertising. Although defendant suggests otherwise (Ch. Br. 58), the record shows that in on-premises identification use of the word "authorized" is the exception rather than the rule (VW Br. 62).

But even if the facts were more favorable to defendant, it would make no difference. The owner of a valuable name and mark does not forfeit his right to protection in his exclusive use thereof because his licensees reinforce their identification with him through a distinctive trade dress, by displaying more than one of his marks or describing themselves as "authorized."

> "It is well established that the fact 'that the owner of a trade-mark uses in association with it accessory symbols or words does not deprive him of the right to it.' " *American Distilling Co.* v. *Bellows & Co.*, 102 Cal. App. 2d 8, 26, 226 P.2d 751, 762 (1951), and cases there cited.

Defendant's argument is a variation on the discredited contention that the owner of two trademarks cannot complain when only one is infringed. As this Court said, in an analogous situation, it is "immaterial and irrelevant" that defendant has not copied the trade dress of plaintiff's licensees, infringed plaintiff's encircled VW emblem or described himself as "authorized." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 314 F.2d 149, 161 (9th Cir. 1963), *cert. denied,* 374 U.S. 830 (1963).

Defendant erroneously thinks otherwise because he tests the propriety of his conduct by the wrong standard. What he does is to treat the mark "Volkswagen" as simply one small aspect of a concern's total trade dress and suggest that his trade dress is so different as to exclude confusion. This argument wholly disregards the fact that the very function of a mark is to identify a common source regardless how different in appearance are the products or businesses to which it is attached.

Just as a consumer would assume that any vehicle bearing the "Volkswagen" trademark has its source in plaintiff, even though he had never seen a similar vehicle so identified, so would he accept without question that one doing business under plaintiff's service mark was operating under plaintiff's aegis, whether or not the premises so identified were painted white or tan, or displayed any other of plaintiff's marks.

In rejecting just such an argument as is made here, one court wrote: "But, ought competitors to be allowed to force appellant to change its methods of advertising? To restrict appellant to a particular dress? To reduce appellant's integral invention to a mere element or feature in a combination claim?" *Enoch Morgan's Sons Co.* v. *Ward,* 152 Fed. 690, 693 (7th Cir. 1907). It is now well settled that "mere differences in the package or dress will not prevent infringement of a registered mark, if it is in fact colorably imitated." *Sierra Chemical Co.* v. *Berrettini,* 33 F.2d 397, 399 (7th Cir. 1929). *Accord: Walter Baker & Co., Ltd.* v. *Delapenha,* 160 Fed. 746, 749-750 (Cir. Ct. D.N.J. 1908).

IV.

The Evidence Regarding "Independent" Is Irrelevant or Incompetent.

Defendant places great weight in his brief, as he did at the trial, on the evidence introduced by him regarding "independent" (Ch. Br. 32-33).

His proof showed that four concerns, in addition to his own, specializing in the repair of Volkswagen vehicles, likewise employ in their advertising and signs the phrase "Independent Volkswagen Service" or similar language (D. Exs. O-1, O-5, O-8, O-11, O-13, P-U). But such evidence is in no way persuasive of the propriety of such

equivocal phraseology. "It is no excuse * * * to say that others have been guilty of the same wrong." *National Lead Co.* v. *Wolfe,* 223 F.2d 195, 204 (9th Cir. 1955), *cert. denied,* 350 U.S. 883 (1955). *Accord*: *Admiral Corp.* v. *Penco, Inc.,* 203 F.2d 517, 521 (2d Cir. 1953); *Standard Oil Co.* v. *Standard Oil Co.,* 252 F.2d 65, 78 (10th Cir. 1958).

Furthermore, the proof relates only to an insignificant fraction of the relevant businesses. One jobber alone testified that in Southern California he supplied ninety concerns specializing in the repair of Volkswagen vehicles outside the Volkswagen organization (RT 624-625, 638). Five concerns out of ninety is scarcely a "substantial number" or indicative of a "growing practice" (CT 144). And there is no evidence of any similar advertising or signs outside defendant's locale, where they may have been spurred by the organization in August 1964 by defendant and others of the "I.V.S.C." (Independent Volkswagen Service Centers) (RT 1019-26). With at least two of the five shops there has been controversy with plaintiff regarding the use of its mark (RT 966, 969-970, 975).

The other evidence relied on by Church (Ch. Br. 46-51) regarding "independent" is equally valueless. Seven witnesses, deemed representative of three hundred, testified, after they first had noted or defined "independent," that to them the words "Independent Volkswagen Porsche Service Center" conveyed the idea of one not forming part of the official Volkswagen family. Not only was the number of witnesses small when compared with the market for "Volkswagen Service" but the group was unrepresentative, their testimony of little or no value and the opinions elicited irrelevant (VW Br. 63).

By 1964, the year prior to trial, somewhat more than one and a half million Volkswagen vehicles had been exported to this country (P. Ex. 66a); in Southern California and Arizona more than 170,000 were in operation (P. Ex.

68g; CT 143). Patently, three hundred witnesses represent less than one-fifth of one per cent of the interested members of the public in defendant's own locality and an infinitesimal number of the total purchasers of services for Volkswagen vehicles. Moreover, this tiny sample was far from representative. On the contrary, it was drawn almost without exception from among Church's customers and persons opposed in interest to the authorized Volkswagen organization (VW Br. 63).

In addition, not even this small, handpicked group was asked what defendant's signs, give-aways and advertising conveyed to them until their attention had first been expressly drawn to the word "independent" and they had been made to focus on its significance (RT 460-462, 535-541, 547-551, 554-558, 570-573, 588-593, 629-632). These are not the conditions of the market place. No one is at the elbow of the motorist to point out the importance of the word "independent."

Furthermore, what these witnesses were expressing at best was their own opinion on a matter on which they were not experts and on which their testimony was entitled to little or no weight. Nims, *Unfair Competition and Trade-Marks,* section 320, p. 1018 (4th ed. 1947); *Premier-Pabst Corp.* v. *Elm City Brewing Co.,* 9 F. Supp. 754, 760 (D. Conn. 1935). Infringement is an issue for the court to be decided by its own evaluation of the challenged signs and advertising. *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* 314 F.2d 149, 151-152 (9th Cir. 1963), *cert. denied,* 374 U.S. 830 (1963); *Standard Oil Co.* v. *Standard Oil Co., supra,* 141 F. Supp. 876, 890 (D. Wyo. 1956), *aff'd,* 252 F.2d 65 (10th Cir. 1958); *Quaker Oats Co.* v. *St. Joe Processing Co.,* 232 F.2d 653, 655-656 (C.C.P.A. 1956).

V.

"Volkswagen" May Not Be Used To Identify Products and Services Not Having Their Source in Plaintiff.

Defendant's brief fails to recognize that "Volkswagen" is not a generic term open to use as a trade or service mark by anyone selling parts or services for Volkswagen vehicles.

As we pointed out in our main brief, one of the elements in defendant's classified telephone advertising contributing to its misleading character is the claim to carry "Complete Stock Factory Parts" (VW Br. 49). This, we observed, is a double wrong because many of Church's parts have never passed through plaintiff's hands.

Defendant justifies his advertising on the ground that the parts in question are acquired "from the same people from whom the Volkswagen factory purchases them" (Ch. Br. 14). But this does not entitle them to be sold as "Volkswagen Parts" or products of the "Volkswagen factory." *A. Bourjois & Co.* v. *Katzel*, 260 U.S. 689 (1923). Only products distributed by plaintiff can be sold under its mark. Anything else, including a part manufactured by plaintiff's own suppliers, is limited to sale as a part for a Volkswagen vehicle. *Ford Motor Co.* v. *Wilson*, 223 Fed. 808 (D.R.I. 1915).

In this connection, defendant questions the sufficiency of the proof that the "Volkswagen" mark carries an assurance of quality lacking in the parts he obtains from allegedly the same suppliers (Ch. Br. 13-14). The elaborate quality control maintained by the Volkswagen factory is described in P. Ex. 9e, Nelson, *Small Wonder: The Amazing Story of the Volkswagen*, 218-219 (1965). And P. Ex. 9-L makes plain that such control extends to parts as well as cars. This pamphlet, "What's Behind Your Volkswagen?" poses the question "What makes this crankshaft a Genuine VW Part?" and answers it as follows: "An inspector

with nothing to do all day but inspect. * * * He'll reject any one of these crankshafts if he finds them one ten-thousandth of an inch out of whack. We pay over 5800 men to do nothing but say no to imperfect Volkswagen parts * * *."

But it would make no difference if no inspection took place and if, in all respects, the parts defendant acquires from his sources were identical to those distributed by plaintiff; they still cannot be sold under plaintiff's mark. Only plaintiff may apply the mark which "stakes the reputation of the plaintiff upon the character of the goods." *A. Bourjois & Co.* v. *Katzel, supra*, 260 U.S. 689, 692 (1923).

Defendant similarly misunderstands the function of a mark when he finds it "inconceivable that in the total absence of evidence to support its position plaintiff herein seeks to obtain an exclusive right in the terminology 'Volkswagen Service', or 'Volkswagen Repair'" (Ch. Br. 64).

But this is the right which the law attaches to the findings by the court below that since 1956 plaintiff has used and advertised "Volkswagen" as a service mark "for services furnished in connection with the maintenance and repair of Volkswagen Products" (CT 139-140) and that the good will inhering in "Volkswagen" as a service mark is the property of plaintiff (CT 143). It necessarily follows that neither defendant, nor anyone else not licensed by plaintiff, may sell "Volkswagen Service."

These findings drain of any significance the testimony of one of defendant's handpicked witnesses that to him "Volkswagen Service" meant simply service for Volkswagen vehicles (RT 601-602; Ch. Br. 63, 65).* Such an opinion is as inconsequential as would be a layman's view

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* The testimony of this witness was peculiarly valueless because, as his cross-examination developed, he disregarded trademarks entirely as badges of identification (RT 609-614).

that a "Volkswagen Part" means a part for a Volkswagen vehicle [*Ford Motor Co.* v. *Wilson*, *supra*, 223 Fed. 808 (D.R.I. 1915)], or that a "Volkswagen Auto Agency" means an agency selling Volkswagen vehicles [*Ford Motor Co.* v. *Benjamin E. Boone, Inc., supra,* 244 Fed. 335 (9th Cir. (1917)].

Plaintiff's right to the exclusive use of its service mark "Volkswagen" is not affected by the fact that two authorized Volkswagen dealers have on a few isolated occasions turned over their used cars to Church for repair (RT 914-916, 1029-1032), or that in emergencies two neighboring Volkswagen shops secured parts from him (RT 913-914), or that a tire alignment specialist has on occasion also done work for Volkswagen dealers (RT 704-705).

Church's work was performed not for customers of the Volkswagen dealers but for the dealers themselves (RT 1029). As for the rest, the fact that parts or special service may at times be secured outside the Volkswagen organization no more cuts down the right of the completed repair to be sold as "Volkswagen Service" than does the fact that some of the parts sold by plaintiff are bought from other manufacturers forfeit plaintiff's right to sell them as "Volkswagen Parts." It is the fact that plaintiff is the source and guarantor of both service and parts that entitles them to be sold under plaintiff's mark.

Finally, the incidents on which defendant places such weight (Ch. Br. 18-19, 39-40) involve a few scattered occasions, clearly *de minimis* when compared with almost 700,000 service transactions annually in Southern California, Arizona and Hawaii by the authorized Volkswagen organization (RT 317-318; P. Ex. 68g).

VI.

Defendant's Criticisms of Our Authorities Are Ill Founded.

Although defendant does not undertake to answer our statement of the principles controlling in this litigation, he charges us repeatedly with omitting significant facts or distorting the decisions from which we draw these guidelines. But, in fact, it is he who misunderstands the cases.

Thus, he contends that the order in *Fiat Societa Per Azioni* v. *Vaughan,* 7 Misc.2d 4, 166 N.Y.S.2d 39 (Sup. Ct. 1957), *modified and aff'd,* 5 App. Div.2d 821, 170 N.Y.S.2d 627 (1st Dep't 1958), "preventing the defendant from using the name 'Fiat' was limited solely to its *method* of use in the telephone directory" and that the order did not, as we advised the Court, prevent its use "*in any manner whatsoever*" (Ch. Br. 15) (emphasis in original). In fact, the controversy regarding the telephone listing related to purely peripheral matters. The significant proviso of the order, affirmed on appeal, enjoined the defendant:

> "from using the name, Fiat, in any manner whatsoever for advertising purposes or for purposes of trade, or for conducting business or for any other purposes, including, without limitation, the continued use of the name Fiat Sales and Service * * *" (Record, p. 7, 5 App. Div.2d 821).

Defendant has been misled by the fact that the opinion on the appeal refers solely to the telephone listing.

Similarly, there is no basis for defendant's claim that we failed to inform the Court that the defendant in *General Motors Corp.* v. *Smith,* 138 U.S.P.Q. 382 (S.D. Cal. 1963), which enjoined use of the name "Smith's Chevrolet Service," had represented "that he was an authorized Chevrolet dealer, and that he had been using the trademarked Chevrolet emblem" (Ch. Br. 15). In fact, the case is four square with the instant one. Smith represented that he was an authorized Chevrolet dealer and used the

Chevrolet trademark in the same manner that defendant has been representing that he is an authorized Volkswagen facility and has been using the Volkswagen trademark, and that is by doing business under a trade name which incorporates the manufacturer's trademark.

Regarding *Yale & Towne Mfg. Co.* v. *Haber,* 7 F. Supp. 791 (E.D.N.Y. 1934), in which a locksmith was enjoined from listing himself in the local telephone directory as "Yale Lock Service," defendant claims that we "omitted to inform the court that the defendant also falsely advertised that he was 'Manufacturers Agent for Yale' along with his other methods of advertising" (Ch. Br. 16). In fact, the defendant's use of the expression "Distributors and Manufacturers Agent for Yale" on his business stationery, not in his advertising, played little or no part in the injunction against his employment of the name "Yale Lock Service."

Obviously no case of trademark infringement is exactly like any other, nor will all the same facts be found to be present. But as the court pointed out in *Volkswagenwerk G.m.b.H.* v. *Frank,* 198 F. Supp. 916, 919 (D. Col. 1961):

> "To be sure, the present case differs somewhat from the cases cited, but these decisions do not establish invariable patterns which govern each situation which arises. The issue in each case is whether the defendant has, regardless of the means used, appropriated the plaintiff's good will."

VII.

What Church Is Seeking Is Not the Right To Compete Fairly but To Draw to Himself the Patronage Built Up for "Volkswagen Service."

Defendant seeks to continue his exploitation and appropriation of plaintiff's good will by claiming that he is doing no more than engaging in "fair" competition (Ch. Br. 6-8, 74). He accuses plaintiff of "attempting to prevent the independent facilities from using the name given by

plaintiff to its products" (Ch. Br. 3, 27). There is no truth whatsoever in this accusation. He himself put in evidence the detailed statement plaintiff sent him early in his career, advising him how the name given by plaintiff to its products, *i.e.*, "Volkswagen," might be used by any person or firm engaged in the service or repair of Volkswagen automobiles, for the purpose of advising the public in a proper manner of his activities (D. Ex. C). Plaintiff has never objected to phrases like "Service for Volkswagen Automobiles" or "Repair of Volkswagen Cars" (*ibid.*).

But defendant does not want simply to advertise that he services Volkswagen vehicles, he wants to be able to represent to the public that he sells "Volkswagen Service" or "VW Service" (Ch. Br. 4-5, 65). He states flatly in his brief that " 'Volkswagen Service' is descriptive and not proprietary" (Ch. Br. 63). Repeatedly he makes clear that he considers the addition of the word "independent" to his advertising to be wholly gratuitous on his part, going beyond any requirement imposed by the law (Ch. Br. 5, 66). His brief belies his claim that he asks only that he "be allowed to continue advertising to the public that he is 'An Independent Volkswagen and Porsche Service Center' " (Ch. Br. 4).

Indubitably, defendant is entitled to engage in the repair and service of Volkswagen vehicles and to inform the world that he is doing so. If the quality of his service is good, he will build up the patronage to which he is entitled. In addition, he will attract whatever segment of the public prefers the individual craftsman to the large organization. But he is not entitled under the banner of "fair competition" to divert to his premises persons seeking "Volkswagen Service."

His use of "Volkswagen Service" is just as wrongful and subject to the same condemnation as "Ford Auto

Agency" [*Ford Motor Co.* v. *Benjamin E. Boone, Inc., supra,* 244 Fed. 335 (9th Cir. 1917)], "Dodge Service" [*Dodge Bros.* v. *East, supra,* 8 F.2d 872 (E.D.N.Y. 1925)], "Yale Lock Service" [*Yale & Towne Mfg. Co.* v. *Haber, supra,* 7 F. Supp. 791 (E.D.N.Y. 1934)] and "Hoover Vacuum Cleaner Repairing" [*Hoover Co.* v. *Groger,* 12 Cal. App.2d 417, 55 P.2d 529 (1936)].

Reaffirmation of these basic principles is peculiarly important because of the growing importance of service to the consumer. The quality and cost of post-sale repair and service are as vital as those of the product itself and the public is entitled to the same protection against deception in their sale.

In no way does plaintiff seek to interfere with defendant's ability to compete fairly for the patronage of Volkswagen owners. All it asks is that the Court stop his misleading use of the marks by which the public identifies plaintiff and its licensees.

If Church's practices go unchecked, there are hundreds of repair shops, both large and small, which, encouraged by such judicial condonation, will duplicate his misleading signs and advertising. Protection of the public and plaintiff alike demands clarification of the law and reversal of the judgment below.

December, 1967.

Respectfully submitted,

Lawler, Felix & Hall,
Leslie C. Tupper,

Herzfeld & Rubin,
Walter Herzfeld,
Cecelia H. Goetz,
Bernard J. Wald,

Attorneys for Appellant.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Cecelia H. Goetz,
Member of the Bar of the
Supreme Court of the United States.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK STURM, Petitioner and Appellant, vs. CALIFORNIA ADULT AUTHORITY, LAWRENCE E. WILSON, Warden of San Quentin State Prison, California, et al., Respondents and Appellees.	)	No. 22072

APPELLEES' BRIEF

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degree), and was sentenced to imprisonment for the term prescribed by law (not less than five years) (CT 2, EXHIBIT A). Appellant did not appeal from the judgment of conviction (CT 2-3).

Applications for writs of habeas corpus to the Superior Court of Marin County (No. 46263) and the California Supreme Court (No. 10402) were denied on August 18 and October 26, 1966, respectively (CT 5-6).

B. Proceedings in the Federal Courts

A petition for writ of certiorari to the United States Supreme Court was denied on March 20, 1967 (CT 5-6). Appellant then filed a petition in forma pauperis for a writ of habeas corpus (No. 47178) in the District Court on March 30 (CT 1-149). On June 1, the petition was denied (CT 150-51); and on June 21, a motion for rehearing was denied (CT 169). On July 7, Judge Sweigert granted appellant's application for certificate of probable cause and for leave to appeal in forma pauperis (CT 182). On July 14, appellant filed a notice of appeal to this Court (CT 183).

STATEMENT OF THE FACTS

On March 6, 1957, in the Superior Court of the City and County of San Francisco, appellant was convicted of robbery in the first degree (Penal Code section 211) and sentenced to imprisonment in the State Prison for the term prescribed by law (EXHIBIT A). On August 17, 1959, the

Amendment rights to the due process of law were violated in that the California Adult Authority has no jurisdiction to the rescinding, redetermining or refixing of the term of sentence once that term of sentence has been fixed pursuant to statutory law, all of which they did so do in the instant case in June, 1960 and July, 1962?

(B) Whether appellant's Eighth Amendment rights concerning the cruel and unusual punishment clause were violated when the California Adult Authority augmented a fixed term of sentence, in July, 1962, subsequent to punishment by the state prison disciplinary committee, in April, 1960, pursuant to an infraction of state prison rule by appellant, if such may be the case?

(C) Whether appellant's Fourteenth Amendment rights to the equal protection of law clause, of like people, in like circumstances, like conditions, like or equal burdens, were violated by appellees et al., by the technical discharge, under seal, of appellant's co-defendant, in June 1962, while appellant remains this day unduly imprisoned for the same debt to society that both were sentenced to state prison for from the state trial court of record in March, 1957?

SUMMARY OF APPELLEES' ARGUMENT

I. The petition does not present a federal question and therefore the District Court had no jurisdiction to grant habeas corpus relief.

II. The Adult Authority has power to determine and redetermine the length of appellant's sentence.

III. The Adult Authority has power to redetermine and lengthen appellant's sentence as a result of infraction of prison rules.

IV. The alleged release of appellant's co-defendant from prison does not compel appellant's release.

ARGUMENT

I

THE PETITION DOES NOT PRESENT A FEDERAL QUESTION AND THEREFORE THE DISTRICT COURT HAD NO JURISDICITION TO GRANT HABEAS CORPUS RELIEF

In In re Costello, 262 F.2d 214 (9th Cir. 1958), it was held that the refixing and lengthening by the California Adult Authority of the term of a prisoner who had violated parole did not involve a federal question; but, rather, was one of purely local nature involving the interpretation of a state sentencing statute, and in the absence of a federal question, the federal courts had no authority to say California interpretation of its statutes, authorizing such action by the Adult Authority, was erroneous. See also In re Mclain, 55 Cal.2d 78 (1960), cert. denied, 368 U.S. 10.

The indeterminate sentence system whereby the Adult Authority fixed, refixed, and refixed again plaintiff's duration of imprisonment is without constitutional infirmity. Dreyer v. Illinois, 187 U.S. 71, 83-84 (1902); Ughbanks v.

Armstrong, 208 U.S. 481, 485 (1908).

We submit that no such federal question has been presented by petitioner as shown by the arguments which follow.

II

THE ADULT AUTHORITY HAS THE POWER TO DETERMINE AND REDETERMINE THE LENGTH OF APPELLANT'S SENTENCE

Appellant was convicted of robbery in the first degree (§ 211);[1] which is punishable by imprisonment in the state prison for not less than five years (§ 213). Section 671 states that where no maximum term is prescribed, the punishment shall be life imprisonment. Section 1168 provides that when a person is sentenced to be imprisoned in a state prison, the court on imposing the sentence shall not fix the term or duration of the period of imprisonment. The Adult Authority may determine what length of time a person shall be imprisoned (§§ 3020 and 5077). These sections of the Penal Code are not violative of equal protection of the law for they operate uniformly against all of the class to which they apply. In re Northcott, 71 Cal.App. 281 (1925). Accordingly, the enforcement of an order by the Adult Authority fixing the duration of confinement should not be a matter for intervention by the federal courts. See Siipola v. Ness, 90 F.Supp. 18 (D.C. Wash. 1950).

---

1. All section references are to the Penal Code.

The length of such term of imprisonment is subject to redetermination from time to time within prescribed limits. People v. Leiva, 134 Cal.App.2d 100 (1955), and Fleischer v. Adult Authority, 202 Cal.App.2d 44 (1962). An indeterminate sentence is, in effect, a sentence for the maximum term, and the setting of the term at something less than the maximum by the Adult Authority is only tentative and may be changed, that is, increased. In re Costello, supra. A prisoner has no vested right to have his term fixed or remain fixed at less than the maximum prescribed by law. In re Smith, 33 Cal.2d 797 (1949): In re Schoengarth, 66 A.C. 288 (1967): and Azeria v. California Adult Authority, 193 Cal.App.2d 1 (1961). The action of the Adult Authority in lengthening the term of imprisonment beyond that originally and by law only tentatively, fixed but still within the maximum term provided for the offense of which his guilt has been adjudged, does not deprive a prisoner of liberty without due process of law. In re Smith, supra.

III

THE ADULT AUTHORITY HAS POWER TO RE-DETERMINE AND LENGTHEN APPELLANT'S SENTENCE FOR INFRACTION OF PRISON RULES

Appellant's sentence was originally fixed by the Adult Authority on August 17, 1959, at six years, with the last two years and nine months to be on parole. However on April 27, 1960, appellant was involved in an infraction

of the prison rules and, as a result, on May 31, the Adult Authority rescinded the action fixing his term and granting parole. Further disciplinary action against appellant was necessary on January 16, 1961, for another infraction the previous week. Thereafter, on July 3, 1962, appellant's sentence was refixed at ten and one-half years, with release to be upon an approved parole plan and appellant to attend the out-patient clinic. Appellant was subsequently paroled on October 19, 1962; but the parole was cancelled on September 13, 1963 (EXHIBIT B).

Appellant now contends that the action of the Parole Board on July 3, 1962, in refixing and lengthening his sentence to ten and one-half years was a violation of his constitutional rights. However, in Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961), cert. denied, 368 U.S. 862, the court said that apart from due process considerations, federal courts have no power to control or supervise state prison regulations and practices. See also Curtis v. Jacques, 130 F.Supp. 920 (W.D. Mich. 1954).

The action of the Adult Authority here did not constitute lack of due process against petitioner. In In re McLain, supra, it was held that an order of the California Adult Authority rescinding its prior action fixing a prisoner's sentence and revoking parole which had been set to commence at a future date, based on the grounds that the prisoner had been

found guilty of complicity in knifing a fellow inmate, disclosed good cause and constituted a valid redetermination of the prisoner's sentence. The order of revocation had the effect of revoking parole and restoring the maximum sentence. See also In re Schoengarth, supra.

IV

THE ALLEGED RELEASE FROM PRISON OF APPELLANT'S CO-DEFENDANT DOES NOT COMPEL APPELLANT'S RELEASE

Appellant alleges that his co-defendant has already been released from prison and that, as a result, his own continued imprisonment is unconstitutional and illegal. However, equal protection of the law does not require that all persons be dealt with identically, but rather that the laws be applied uniformly. Baxstrom v. Herold, 383 U.S. 107 (1966).

Section 3024.5 provides that the Adult Authority may refix a prisoner's term to discharge him whenever it has been determined that the prisoner has made a satisfactory adjustment and rehabilitation. Quite obviously, such a determination must be based upon the best interests of society and that particular prisoner and is in no way connected with the release or retention of a codefendant.

In Azeria v. California Adult Authority, supra, the court said that a major purpose of the indeterminate sentence law is to permit individual treatment of offenders according

to the best judgment of the Adult Authority; and the fact that other prisoners have had their sentences reduced or been granted parole affords no ground for complaint by a habeas corpus petitioner.

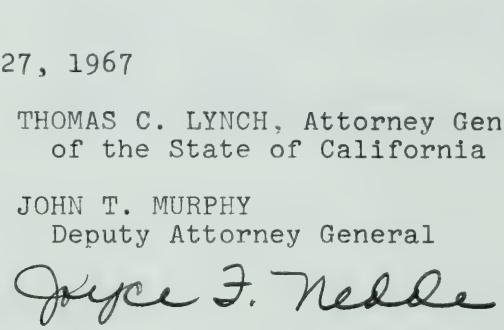
Therefore, petitioner has not shown he was denied equal protection of the law.

It is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus should be affirmed.

DATED: September 27, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

JOHN T. MURPHY
Deputy Attorney General



JOYCE F. NEDDE
Deputy Attorney General

Attorneys for Appellees

JFN:cmw
CR SF
67-877

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

September 29, 1967

Joyce F. Nedde

JOYCE F. NEDDE
Deputy Attorney General
of the State of California

A P P E N D I X

DEPT. No. 6 CASE NO 53032

Officer at Prison

Deputy Sheriff

A 12799

In the Superior Court of the State of California

IN AND FOR THE CITY and COUNTY OF SAN FRANCISCO

ABSTRACT OF JUDGMENT

(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,

vs

FRANK STUHM

Defendant.

Hon. Harry J. Neuberth (Judge of Superior Court)

F. G. Campbell (District Attorney)

H. P. Glassman (Counsel for Defendant)

This certifies that on the 6th day of March, 19 57 judgment of conviction of the above-named defendant was entered as follows:

In Case No. 53032 Count No. One he was convicted by Court (Court or Jury); on his plea of Not Guilty (guilty, not guilty, former conviction or acquittal, once in jeopardy, not guilty by reason of insanity); of the crime of Robbery, First Degree

(designation of crime and degree, if any, including fact that it constitutes a second or subsequent conviction of same offense if that affects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm)

in violation of Violating Section 211 of the Penal Code of the State of California (reference to Code or Statute, including Section and Sub-section);

with prior convictions charged and proved or admitted as follows: None

DATE	COUNTY AND STATE	CRIME	DISPOSITION

Defendant was (was) or (was not) charged and admitted being, or was found to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024.

CA-75 (11627)

Defendant was not (was) or (was not) adjudged a habitual criminal within the meaning of Sub-division a or b (a) or (b) of Section 644 of the Penal Code; and the defendant is not (is) or (is not) a habitual criminal in accordance with Sub-division (c) of that Section.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California, for the term provided by law, and that he be remanded to the Sheriff of the City and County of San Francisco and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows.....
(Note whether concurrent or consecutive as to each count);

and in respect to any prior incompleted sentence (s) as follows:.....
(NOTE whether concurrent or consecutive as to all incomplete sentences from other jurisdictions);

To the Sheriff of the City and County of San Francisco and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at San Quentin, California at your earliest convenience.

Witness my hand and seal of said court

this 6th day of March, 1957

MARTIN MONGAN Clerk

by J. J. Fitzpatrick Deputy

SEAL

State of California,
City and County of San Francisco

I do hereby certify that the foregoing to be a true and correct abstract of the Judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

Attest my hand and seal of the said Superior Court this 6th day of March 19 57

MARTIN MONGAN
County Clerk and Ex-officio Clerk of the Superior Court of the State of California in and for the City and County of San Francisco

The Honorable: John J. McMahon
Judge of the Superior Court of the State of California, in and for the City and County of San Francisco

Five days stay of execution.

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

Recorded Min. Book, Dept. 6 Vol. .90 Page 273

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT ANDERSON, Petitioner-Appellant, vs. THE PEOPLE OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 22073

APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT ANDERSON, Petitioner-Appellant, vs. THE PEOPLE OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 22073

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

Proceedings in State Courts

On September 29, 1960, appellant was found guilty in the Los Angeles Superior Court of violating

section 11501 of the California Health and Safety Code (sale of a narcotic other than marijuana). The proceedings were suspended and appellant was granted probation. No appeal was taken from this conviction. A copy of the minute order finding appellant guilty is attached as Appendix A.

On December 16, 1963, petitioner upon his plea of guilt was once again convicted in the Los Angeles Superior Court of violating section 11501 of the California Health and Safety Code. The probation previously granted on the 1960 conviction was revoked and appellant was sentenced to the state prison for each violation of California Health and Safety Code section 11501, the sentences to be served concurrently. Copies of appellant's judgments and commitments are attached as Appendix B.

With respect to the 1963 conviction, appellant filed a late notice of appeal seeking relief under Rule 31(a), California Rules of Court. The California Court of Appeal, Second Appellate District, Division Two, denied the application on October 28, 1965. A copy of the minute order denying the application is attached as Appendix C. The California Supreme Court denied a hearing on or about December 22, 1965. A copy of the minute order denying the hearing is attached as Appendix D.

In a petition filed September 16, 1964, appellant sought a writ of habeas corpus from the Marin County Superior Court. It is not clear from the petition whether appellant was attacking one or both of his convictions, the general argument running primarily to the validity of California narcotics laws. This petition was denied September 17, 1964. A copy of the petition is attached as Appendix E. A copy of the order denying the petition is attached as Appendix F.

Appellant filed a petition for habeas corpus in the California Supreme Court February 16, 1966. This petition attacked the validity of the 1963 conviction by alleging violations of the rules announced in People v. Dorado, 62 Cal.2d 338 (1965). This petition was denied March 30, 1966. A copy of the petition is attached as Appendix G.

Proceedings in the Federal Courts

Appellant petitioned the United States District Court, Northern District of California, for a writ of habeas corpus. Petitioner in his attack on the 1963 conviction alleged denial of right to counsel during interrogation. No attack on the 1960 conviction was made. This petition was denied January 20, 1966. A copy of the petition is attached as Appendix H. A copy of the order denying the petition is attached as Appendix I.

Appellant again petitioned the United States District Court, Northern District of California, for a writ of habeas corpus. In this petition appellant attacked both convictions alleging that he gave coerced statements and was denied counsel. This petition was denied June 21, 1966. A rehearing on the petition was denied July 26, 1966. A copy of the petition is attached as Appendix J. A copy of the order denying the petition and the order denying a rehearing is attached as Appendix K.

Appellant once more petitioned in an application filed May 8, 1967, the United States District Court, Northern District of California, for a writ of habeas corpus (CT 13). Judge Carter of that court denied the petition on May 8, 1967 (CT 13-14). On June 15, 1967, an order granting appellant's application for a certificate of probable cause was issued and appellant was allowed to appeal in forma pauperis (CT 21-22).

APPELLANT'S CONTENTIONS

1. The probation granted in respect to his 1960 conviction was revoked after the probationary period had expired.

2. The use of his 1960 conviction to increase the punishment on his 1963 conviction violates his constitutional protection against double jeopardy.

SUMMARY OF APPELLEES' ARGUMENT

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S APPLICATION FOR HABEAS RELIEF.

ARGUMENT

We are persuaded that the District Court Judge correctly disposed of appellant's application for habeas relief. We rely upon the language of his order as our argument in this case. The order was as follows:

> " * * * Petitioner is presently confined at San Quentin State Prison pursuant to two state court convictions for violations of California Health and Safety Code § 11501. In this application the petitioner contends that the sentence of probation he received pursuant to his first conviction, #231189, was revoked after the probationary period had expired. Secondly, it is contended that the use of the prior conviction to increase his sentence in #278150 subjects the petitioner to double jeopardy.
>
> "With respect to these contentions the law is clear that the imposition of heavier penalties against those persons with prior convictions does not violate any constitutional principles. See Spencer v. Texas, 385 U.S. 554 (1967). Petitioner's

attack on #231189 is premature, for having found that he is serving a valid term of imprisonment under #278150, the rule of McNally v. Hill, 293 U.S. 131 (1934) precludes this Court's inquiry into the prior conviction.

"Accordingly, IT IS ORDERED that this action as set forth in the petition for a writ of habeas corpus be, and the same is hereby dismissed." (CT 13-14).

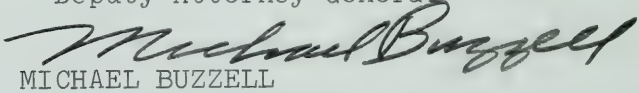
CONCLUSION

For the reasons stated above, appellees respectfully submit that the order of the District Court denying appellant's petition for the writ of habeas corpus should be affirmed.

Dated: October 5, 1967.

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General



MICHAEL BUZZELL
Deputy Attorney General

Attorneys for Respondents-Appellees.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: October 5, 1967.

MICHAEL BUZZELL
Deputy Attorney General

A P P E N D I C E S

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 111

SEP 29 1960 19 Present Hon. JOHN F AISO Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, vs

ROBERT ANDERSON 231189

Trial is resumed, People's cause having been submitted on preliminary transcript. Deputy District Attorney John C Galliano and the Defendant with counsel, F A Spindell, present. Weldon Daniels Lockhart Jr is sworn and testifies for the People on further cross-examination. People rest. Robert Anderson is sworn and testifies in his own behalf. Defendant's Exhibit A (shirt and brown paper bag) is marked for identification. Defendant rests. The Court adjudges defendant "Guilty". A Probation Officer's report is ordered. Further proceedings continued to October 26, 1960, 9 A M. Remain on bail. By stipulation, defendant's Exhibit A is returned to defendant in open Court.

This Minute Order has been entered on OCT 4 '60
HAROLD J. OSTLY, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.
By Virgil Henry Deputy

PROB.	/	AUD.		DMV	
LAPD	/	CSHR.		CYA	
CO.J.		JUV.		C. CLK.	/
SHER.		PSYC.		MISC.	

MINUTES

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

MINUTES

Department No. 111

OCT 26 1960 19 Present Hon. JOHN F AISO Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, vs

ROBERT ANDERSON 231189

Defendant with counsel, F A Spindell, present. Proceedings suspended. Probation granted for three years.

- [x] Spend first 8 months in County Jail. (240 days)
- [x] Road Camp or Honor Farm Recommended.
- [ ] Good time allowed if earned.
- [ ] Pay fine of $_____ through Probation Officer in such manner as such officer shall prescribe
- [ ] Make restitution through Probation Officer in such amounts and manner as such officer shall prescribe.
- [ ] Pay any judgment arising out of this matter, when it becomes final in such amounts and manner as Probation Officer shall prescribe.
- [ ] Abstain from all alcoholic beverages and stay out of places where they are the chief item of sale.
- [x] Not use or possess any narcotics or narcotic paraphernalia and stay away from places where addicts congregate.
- [x] Not associate with known narcotic users or sellers.
- [ ] Have no blank checks in possession, not write any portion of any checks, not have bank account upon which may draw checks.
- [ ] Not gamble or engage in any bookmaking activities or have paraphernalia thereof in possession, and not be present in places where gambling or bookmaking is conducted.
- [ ] Not associate with _____
- [ ] Stay out of places where homosexuals congregate.
- [ ] Not associate with children under 14 years except in presence of responsible adults.
- [ ] Cooperate with Probation Officer in plan for psychiatric, psychological or other treatment.
- [x] Seek and maintain employment as approved by Probation Officer.
- [ ] Support dependents.
- [x] Maintain residence as approved by Probation Officer.
- [ ] Surrender drivers license to Clerk of Court to be returned to Department of Motor Vehicles, and not drive a motor vehicle for the first year after release from custody nor until lawfully licensed.
- [x] Obey all laws, orders, rules and regulations of Probation Department and of the Court.

Remanded. Bail exonerated.

This Minute Order has been entered on OCT 31 '60

HAROLD J. OSTLY, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By Virgil Henry Deputy

PROB. /	AUD.	DMV
LAPD /	CSHR.	CYA
CO. J. /	JUV.	C. CLK.
SHER.	PSYC.	MISC.

MINUTES

76M414—4/59

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 111 HON. JOHN F. AISO, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ROBERT ANDERSON, Defendant	No. 231189 PROBATION 3 YEARS COUNTY JAIL 8 MONTHS

Los Angeles, California, Wednesday, October 26, 1960; 9:00 a.m.

On the above date this matter came on regularly for hearing before Hon. John F. Aiso, Judge of the Superior Court of the State of California, in and for the County of Los Angeles; the People being represented by J. Galliano, Deputy District Attorney of Los Angeles County; the defendant being present with counsel, F. A. Spindell; whereupon the following proceedings were had, to wit:

(Ward E. McConnell, Official Reporter.)

THE COURT: People against Anderson. Defendant Anderson is before the Court with his counsel, Mr. Spindell, in this case No. 231189. The Court found defendant guilty of violating Section 11501 Health and Safety Code of this State. Now is the time for pronouncement of judgment and sentence. Do you waive further arraignment for judgment?

MR. SPINDELL: Waive further arraignment for judgment, your Honor.

THE COURT: The Court has read and considered the Probation Officer's report. Is there any legal cause why judgment and sentence should not be pronounced and sentence passed?

MR. SPINDELL: No legal cause. I would like to be heard.

THE COURT: Very well.

MR. SPINDELL: Anything I am going to say, your Honor, I don't want possibly to be construed as something said in mitigation of the nature of the offense, a heinous offense, but I would like your Honor once more to consider what the Probation Officer has to say about Mr. Anderson as a person. He described him as a person susceptible but if he is susceptible, I believe, your Honor, may be, seriously, susceptible to a program of rehabilitation. He is not a letter writer, he is not much of a talker, but he has expressed to me, your Honor, it seems a sincere desire to change his surroundings to get out of the milleu and start anew. Again, your Honor, I want to point something the Probation Officer pointed to, 12 years of service --

THE COURT: Counsel, let me advise you this, I am not going to follow the recommendations of the Probation Officer in this case.

MR. SPINDELL: There will be no further argument, your Honor.

THE COURT: He is going to have to do some County Jail time.

MR. SPINDELL: That he is more than aware of.

THE COURT: Are you ready to go today?

THE DEFENDANT: Yes, sir.

THE COURT: Proceedings are suspended. You are placed upon probation for a period of three years, subject to standard conditions 1, 6, 7, 14, 16 and 18.

You will do 8 months or 240 days in the County Jail, road camp or honor farm recommended as a condition of probation;

No. 6, you will not use or possess any narcotics or narcotic paraphernalia and stay away from places where addicts congregate;

No. 7, you will not associate with known narcotic users or sellers;

No. 14, you will seek and maintain employment as approved

by the Probation Officer;

And, 16, you will maintain a residence as approved by the Probation Officer;

And, 18, you will obey all laws, orders, rules and regulations of the Probation Department and of this Court.

You are ordered remanded to do your 8 months as a condition of probation. Bail is ordered exonerated.

STATE OF CALIFORNIA, County of Los Angeles

No. 231189

I, WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original

Minutes of September 29, 1960, M nutes of October 26, 1960, Proceedings of October 26, 1960, in the case of the People vs. ROBERT ANDERSON

on file and of record in my office, and that I have carefully compared the same with the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Superior Court.

Dated: September 28, 1967

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles

By Katherine L. Mills, Deputy

THIS CERTIFIED COPY IS GIVEN FREE OF CHARGE PURSUANT TO LAW SOLELY UPON THE CONDITION THAT IT IS TO BE USED FOR OFFICIAL BUSINESS AND/OR TO DETERMINE ELIGIBILITY FOR VETERANS BENEFITS.

76C135M—Cdb 7-66

H. F. Lopez
W. Fuimaono 007638 C. I. M.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

1963 DEC 31 AM 11:37

G.C. ADMINISTRATIVE

JUDGMENT

Department No. 108

December 16 1963 Present Hon. NEWELL BARRETT Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, vs

278150

ROBERT ANDERSON

Matter of probation and sentence is called for hearing. Deputy District Attorney F. Linn and the Defendant with counsel F. A. Spindell, present. Probation denied. Sentenced as indicated.

Whereas the said defendant having duly pleaded guilty in this court of the crime of VIOLATION OF SECTION 11501, Health and Safety Code, a felony, as charged in Count 7 of the indictment as amended; prior conviction having been found true as alleged, to wit: crime of 11501 Health and Safety Code, a felony, Superior Court of the State of California, Los Angeles County, September 26, 1960

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison for the term prescribed by law.

Other Counts dismissed.

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Director of Corrections at the California State Prison at Chino.

This minute order was entered
DEC 19 1963
WILLIAM G. SHARP, COUNTY CLERK
Clerk of the Superior Court BY C. A. RHETTA DEPUTY
C. A. Rhetta

This Minute Order has been entered on
WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By Dep.

Prob.	Aud.	DMV	
LAPD	Cshr.	CYA	
CO. J.	Juv.	C. Clk.	
Sher.	Psyc.	Misc.	

JUDGMENT — State Prison (Men)

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.
ATTEST:
CALIFORNIA STATE PRISON AT SAN QUENTIN
BY
RECORDS OFFICER
(AFFIX SEAL)

Dated:
WILLIAM G. SHARP, County Clerk By Deputy

B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

MINUTES OF DIVISION TWO

October 28, 1965

Ext. No. 65-322	People, etc. vs Anderson

THE COURT:

Application pursuant to Rule 31(a) is denied.

CLAY ROBBINS, JR., Clerk of the Court of Appeal, Second Appellate District, State of California, [illegible] hereby certify the foregoing is a true and [illegible] copy of an order made by this Court, as shown [illegible] in the minutes.
Witness my hand and seal of this Court this 26TH day of SEPTEMBER A.D. 19 67.
CLAY ROBBINS, JR., Clerk

By C. Porter
Deputy Clerk

ORDER DENYING HEARING

AFTER JUDGMENT BY DISTRICT COURT OF APPEAL

2nd District, Division 2, Ext. No. 65-322

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

ANDERSON

Defendant's petition

or hearing DENIED.

I, [illegible] of [illegible] by the [illegible]

27th day of September 1967

By K. Matteoli

Deputy Clerk

FILED

DEC 22 1965

WILLIAM L. SULLIVAN, Clerk

By [illegible]

S. F. Deputy

Tobriner

Chief Justice

Robert Anderson
Post Office Box A-31859
San Quentin, Marin, California

40803

1 On Original Application for Habeas Corpus

2 In The Superior Court of the State of California, In And For The County Of

3 Marin, San Rafael, California.

4 I N D E X

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16 C I T A T I O N O F A U T H O R I T I E S

17 CONSTITUTIONAL PROVISIONS: California

18 Article 1 Section 1

19 Article 1 Section 3

20 Article 1 Section 5

21 Article 1 Section 19

22 CONSTITUTIONAL PROVISIONS: United States

23 Article VI Section 2

24 First Amendment

Fourteenth Amendment

25 STATUTORY AUTHORITY: California

26 Penal Code Section 1473 6

27 Penal Code Section 1474 6

28 Penal Code Section 1480 (Exhibit C)

29 Penal Code Section 1487 6

30 Penal Code Section 1506 6

31 Penal Code Section 1505 6

32

E

CASES CITED

In Re Hess (1955)45 Cal. 171

In Re Oliver 333 U. S. 257

Cooke v.United States, 267 U. S. 517-536-537

In Re Diquiro, 100 Cal. App. 2d 2000, 201

People v. Robinson, 107 Cal.App. 211

Burns v. Ohio (1959) 360 U. S. 252

Griffin v. Illinois (1956) 351 U. S. 12

Smith v. Bennett (1961) 365 U. S. 700

Bullock v.South Carolina (1961) 365 U. S. 292

Sunal v.Large, 332 U. S. 174 at 181

United States ex rel Mills v. Hagen 77 Fed Supp. 15

People v. Montgomery 51 Cal. 2d 444

Behrens v. Heronimus, 166 P. 2d 245

Ker v. California (1963) 374 U. S. 23

Boyd v. United States (1885 (116 U.S. 616

Carter v. United States(1963) 314 F. 2d 386

Townsend v. Sain (1963) 372 U. S. 391

In Re Pramble (1947) 31 Cal. 2d 43, 46, 51 (Writ Denied)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

ROBERT ANDERSON
PETITIONER
ON APPLICATION FOR WRIT OF
HABEAS CORPUS

REFER: 231189 and 278150

PETITION FOR WRIT OF HABEAS CORPUS

To: The Presiding Judge, Superior Court of the County of Marin
State of California, San Rapheal, California.

The petition of Robert Anderson, respectfully follows; and in which he applies for a Writ of Habeas Corpus. Subpoena Duces Tecum, by his valid and verified petition, and in this behalf sets forth the following facts and causes for the issuance of the Writ:

I

That he the aforesaid Robert Anderson, is imprisoned within the California State Prison at San Quentin, California, County of Marin and under the custody and control of Mr. Lawrence E. Wilson, Warden of the aforesaid prison.

II

1. That although he is presumed to be lawfully imprisoned, detained, confined and restrained of his liberty by Mr. Lawrence E. Wilson, San Quentin State Prison, that the said imprisonment, detention and confinement is as a matter of law illegal, the petitioner is now and has since the 31st day of December, 1963, been confined on a "plea of guilty", and confined on a "plea of guilty", pursuant to an offense as prescribed by the California Health and Safety Code Section 11501 with a prior as prescribed and defined by California Health and Safety Code Section 11504 (See Exhibit "B" pages 2 and 4)

2. That in addition the Petitioner has a further restraint placed upon him by circumstances of his indegency, and therefore cannot secyre the records that would, by his honest belief, show that he is entitled to either all the relief prayed for in his application for Writ of Error Coram Nobis, or that in any event he be allowed to take advantage of the new ruling of the Courts, which to the petitioner seems to indicate that

the Courts are inclined in certain cases to consider, the mandatory to severe.

III

The Petitioner Contends imprisonment is illegal, and the illegality thereof consists in this, to wit:

1. That the Health and Safety Code Section 11501 deprived the petitioner of his day in Court, even before he is charged officially with the offense.

2. That the Health and Safety Code is preempted from the imposition of a minimum Term of Ten Years for a second offense by Section 644 of the California Penal Code.

3. That the Health and Safety Code deprives the Court of its most important function, the granting of a fair and impartial trial, because it imposes no restraints upon the officers in the investigation and the procurring of evidence.

4. That for the above reasons the Health and Safety Code Section 11501, 11851 and especially the retrospective part of Section 11504 which declares: (Added by Stats. 1961, Ch. 274, Section 5)

"As used in this Article (Art 1) "Illegal, Sale, Possession, Administration and Transporting". "Felony Offense" and offense for which the law prescribes imprisonment in the state prison as either an alternative or the sole penalty, "regardless of the sentence the particular defendant received" (this portion petitioner believes to be retrospective) punishable as a Felony. Places the petitioner in double jeopardy for a prior offense.

5. That the petitioner believes this Court has the power to modify the judgment as entered. (See Exhibit "B" page 4)

IV

The Constitutional Provisions and Statutory provisions are contained in Petitioner's Points and Authorities.

V

The facts of this case are contained in the arrest and arraigment on a Charge of Possession of Narcotics (See Exhibit "B" lines 18 through 28)

That the most persuasive facts are contained in the arresting officer's testimony on a preliminary hearing on the possession charge, although

Your petitioner as being: "watery eyed, and of drowsy of appearance" or words of that general meaning and effect. And with due regard to the Courts below and not in disregard of their and this Court's task of protecting the public interest, petitioner respectfully urges this Court to subpoena the records for three very important reasons, namely:

(1) So that the Court will not deny the petition outright; and

(2) To eliminate the necessity of petitioner's having to reestablish facts that the prosecution through its own witnesses have already established and so testified; and

(3) To establish a claim to have recent rulings applied to the facts therein disclosed to this particular case.

VI

Jurisdictional Statement:

The Petitioner relies on this application and urges that in good faith and pursuant to the guarantees of Article 1 Section 5 of the Constitution of the State of California; and Article 1, Section 9, paragraph 2, and Article 111 Section 2 of the United States Constitution, as secured by the Due Process Clause of the Fourteenth Amendment are applicable to this petition. The Statutory Authorities are embodied in the Case Authorities cited.

Petitioner would refer the court to his Memorandum of Points and Authorities In Support of Petition For A Writ of Habeas Corpus for case law which supports petitioners contentions.

VII

Petitioner prays that this Honorable Court issue a Writ of Habeas Corpus directed to Mr. Lawrence E. Wilson, Warden, San Quentin Prison, and respondent above-named, and a Writ of Subpoena Duces Tecum directed to the respondent Court directing the compiling of all the oral proceedings in connection with the case of People of the State of California v. Robert Anderson, Case Numbers 231189 and 276150, during the proceedings herein described, or an alternative show cause order to show why petitioner should not be released on the grounds aforementioned in this petition for a Writ of Habeas Corpus.

Respectfully Submitted,

Robert Anderson

A-81859

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner herein sets forth his points and authorities in support of his petition for writ of habeas corpus.

Point 1: Confinement:

That a prisoner in custody has the Constitutional right to a judicial enquiry into the true cause of his imprisonment has been long an established fact in both this State and in the Federal Courts. As stated by the Supreme Court in the case of In Re Hess (1955) 45 Cal. 2d 171, 183; 288 P. 2d 5.

"Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial. (In Re Oliver, 333 U.S. 257, 273 (68 S. Ct. 499 92 L. Ed. 682); Cooke v. United States, 267 U.S. 517, 536-537 (45 S. Ct. 390, 69 L. Ed. 767; In Re Diquiro, 100 Cal. App. 2d 260, 261 (223 P. 2d. 263) see also People v. Robinson, 107 Cal. App. 211, 217 (290 P. 470)

Where it is alleged that a person incarcerated in a State Prison by legal process; and the petitioner contends the contrary, the Supreme Court of the United States declared in Burns v. Ohio, (1959) 360 U.S. 252, 256, and in Griffin V. Illinois, 351 U.S. 12 that:

"...Such denial to furnish the petitioner the necessary records, transcripts, etc., is a denial of Equal Protection of Law and of Due Process, for such a refusal on the part of the States hinders the petitioner from prosecuting the Writ of Habeas Corpus or any other mode of redress"

In Smith v. Bennett, (1961) 365 U.S. 700 the Supreme Court of the United States declared that:

"...There can be no equal justice where the kind of a trial or treatment a man gets depends upon the amount of money he has"

Griffin v. Illinois, supra, at 19.

Point 2: Habeas Corpus has been allowed to make a record (Bullock v. South Carolina (1961) 365 U.S. 292); Or has been to take advantage retroactively of a decision of law, Sunal v. Large, 332 U.S. 174 at 181; (67 S. Ct. at 1592

that one of the exceptional circumstances justifying the use of habeas corpus to raise a point that could have been but was not appealed is "where the law was changed after the time for appeal had expired".

Even if facts relied on could have been raised on appeal by writ of error with bill of exceptions, they may still be raised by habeas corpus where they involve not merely errors of law but violations of basic constitutional safeguards of life, liberty and the pursuit of freedom, and such rule applies regardless of weather defendant was represented by counsel at the trial stage. United States ex rel. Mills v. Ragen, 77 Fed. Supp. 15.

If in the application of the State of California rules of practice and procedure in trials and appeals, an accused's liberty has been violated or jeopardized by denial of his immunities under the Federal Constitution, regarding rights of accused to a speedy and public trial, conferring equal protection of the law upon all persons within a State, accused is entitled to an investigation of the facts preceding and attendant upon his conviction by habeas corpus, but such investigation may not be initiated by a motion to vacate such judgment People v. Montgomery, 51 Cal. 2d. 444.

And, habeas corpus provides a remedy for jurisdictional and consitiutional errors at trial, without limit of time. Behren v. Heronimus, 166 F. 2d 245; United States v. Smith, 333 U.S. 469.

Point 3:

The petitioner believes that the Courts of the State of California are making a sincere effort to reevaluate and define its Narcotics Laws as per reports in the newspapers of judicial conferences in regards to this most crucial matter and particularly in the field of severe and harsh punishment as reflected in the United States Supreme Court's, comments upon the California Supreme Courts decision of People v. Cahan, (1955) 44 Cal. 2d 434, quoted with approval Kev v. California, (1963) 374 U.S. 23.

Point 4:

The decisions above and below reflect the Constitutional provisions as applies to this petition, therefore petitioner respectfully urges this Court's acceptance of this petition with the reservation that petitioner be granted authority to file a traverse if a show cause order is issued.

The facts of this case are contained in the original arrest upon the charge of illegal possession, petitioner readily concedes that he was admitted to bail, but it is urged that the actions come under the principle "that no

arrest is made proper retroactively by what is found after such search or arrest and he relies on Boyd v. United States, (1886) 116 U.S. 616, 630; Carter v. United States, (1963) 314 F.2d. 386 and Townsend v. Sain, (1963) 372 U.S. 391

VI

JURISDICTION:

The judgments of the Superior Court of the State of California in and for The County of Los Angeles, The Honorable Newell Barnett, Judge, Department 108, Presiding.

A. Judgment entered 22 November 1963 (on guilty plea) and commitment to the California Department of Corrections followed on 31 December 1963 (See Exhibit B. page 2.)

B. Judgment of denial of application for Writ of Error Coram Nobis entered on 19 May 1964.

The judgment of this Court is invoked pursuant to California Penal Code Sections 1473, 1474, 1475, 1480, 1484, 1485 and 1506; In Re Bramble, (1947) 31 Cal. 2d.43, 46, 51 (187 P.2d 411)

"Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint" Penal Code 1473 (2,3) The scope of inquiry at the hearing on the writ includes consideration of "any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge" (Pen. Code 1484) and "if no legal cause is shown for such imprisonment or restraint, or for the continuation thereof,... (the) court or judge must discharge such party from the custody or restraint under which he is held" (Pen. Code 1485) which means that the petitioner may be discharged from illegal conditions of restraint although not from all restraint. Since this is the function and scope of habeas corpus, we conclude that it is proper and desirable to interpret section 1506 of the Penal Code in its use of the word "discharge" as being fully a broad as the scope of the writ itself."

Petitioner contends that the power of the Courts has been enlarged by judicial reasuring of some of the eminent Judges both State and Federal in the field of Narcotic prosecutions. And further that the judiciary tribunals of this State has been carefully investigating the implementations of police

officials in carrying the Health and Safety Code into execution and in some instances are revising the judgments to comply with the requirements of fundamental fairness, and in Griffin v. Illinois, (1956) 351 U.S. 12, 25-26, that the Court's powers to say how far back into the past a newly made rule, even one declaring constitutional rights, must be applied. (Frankfurter, Justice, concurring.)

PRAYER

Petitioner prays that this Honorable Court issue a Writ of Habeas Corpus directed to Mr. Lawrence E. Wilson, Warden, San Quentin Prison, and respondent above named; and;

Petitioner further prays this Honorable Court issue a Writ of Subpoena Duces Tecum directed to the Honorable Newell Barrett, Judge, the Superior Court of the State of California, in and for the County of Los Angeles, Department 108, to forward to this Honorable Court all the records, arrest reports, preliminary examinations, plea, judgment and sentence, or an alternative show cause order to show why petitioner should not be released on the grounds aforementioned in this petition for a writ of habeas corpus.

Respectfully Submitted,

Robert Anderson

A-81859

CALIFORNIA CONSTITUTION

ARTICLE I:

Section 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.

Section 3: The State of California is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land.

Section 5: The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require its suspension.

ARTICLE I Section 19. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on prbable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized. (Emphasis Petitioner's)

UNITED STATES CONSTITUTION

ARTICLE VI:

Section 2: This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

FIRST AMENDMENT:

Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (Emphasis Petitioner's)

FOURTEENTH AMENDMENT:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA PENAL CODE: HABEAS CORPUS SECTION
(Title XII ch. I)

Section 1473: (Who may prosecute writ) : Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of Habeas Corpus to inquire into the cause of such imprisonmentor restraint. (Enacted 1872 ; Am. CodeAmdts. 1873-74, p. 454.

Section 1474:(Application for, how made)(Contents of Petition:Verification)

Application for the writ is made by petition either by the party for whose relief it is intended or by some person in his behalf, and must specify:

1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties, if they are known, or describing them, if they are not known;

- - - - - - - - - - - - -

2. If the imprisonment is alleged to be illegal, the petitioner must also state in what the alleged illegality consists;
3. The petition must be verified by the oath or affirmation of the party making the application. (Enacted 1872)

Annotation: See 11 McK.Dig. Habeas Corpus ##15-54; Cal. Jur. 2d Habeas Corpus ## 74-77-78; 25 Am. Jur. 235.

Section 1480:

Return, what to contain: (Signature and Verification)
The person upon whom the writ is served must state in his return, plainly and unequivocally:

1. Whether he has or has not the party in his custody, or under his power or restraint;

2. If he has the party in his custody or power, or under his restraint, he must state the authority and causes of such imprisonment or restraint;

3. If the party is detained by virtue of any writ, warrant , or other written authority, a copy thereof must be annexed to the return, and the original produced and exhibited to the court or judge on the hearing of such return;

4. If the person upon whom the writ is served had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ of habeas corpus, but has transferred such custody or restraint to another, the return must state particularly to whom, at what time and place, for what cause, and by what authority such transfer took place;

5. The return must be signed by the person making the same, and except when such person is a sworn public officer, and makes such return in his official capacity, it must be verified by his oath (Enacted 1872)

2. If the imprisonment is alleged to be illegal, the petitioner must also state in what the alleged illegality consists;
3. The petition must be verified by the oath or affirmation of the party making the application. (Enacted 1872)

Annotation: See 11 McK.Dig. Habeas Corpus ##15-54; Cal. Jur. 2d Habeas Corpus ## 74-77-78; 25 Am. Jur. 235.

Section 1480:

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2. If he has the party in his custody or power, or under his restraint, he must state the authority and causes of such imprisonment or restraint;

3. If the party is detained by virtue of any writ, warrant , or other written authority, a copy thereof must be annexed to the return, and the original produced and exhibited to the court or judge on the hearing of such return;

4. If the person upon whom the writ is served had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ of habeas corpus, but has transferred such custody or restraint to another, the return must state particularly to whom, at what time and place, for what cause, and by what authority such transfer took place;

5. The return must be signed by the person making the same, and except when such person is a sworn public officer, and makes such return in his official capacity, it must be verified by his oath (Enacted 1872)

Robert Anderson
Post Office Box A-81859
San Quentin, Tamal, California

1 On Original Application for Habeas Corpus

2 In The Superior Court Of The State Of California, In And For The County Of

3 Marin, San Rapheal, California.

4

5 V E R I F I C A T I O N

6 UNITED STATES OF AMERICA)

7 STATE OF CALIFORNIA) : SS

8 COUNTY OF MARIN)

9 I, Robert Anderson, being first duly sworn, deposes, and say:

10 That I am the Petitioner in the above entitled matter; that I have

11 prepared and read the foregoing petition and know the contents thereof; that

12 the same id true of his own knowledge, except as to those matters which are

13 therein stated on information or belief, and as to those matters that I

14 believe it to be true.

15 I declare under the penalty of perjury that this is correct and true.

16 Robert Anderson
ROBERT ANDERSON
A-81859
17 San Quentin, Tamal, California

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Robert Anderson
Post Office Box A-81659
San Quentin, Tamal, California

On Original Application for Habeas Corpus

In The Superior Court Of The State Of California, In And For The County Of Marin, San Rapheal, California.

PROOF OF SERVICE BY MAIL

UNITED STATES OF AMERICA)
STATE OF CALIFORNIA) SS:
County of Marin)

I, Robert Anderson, being duly sworn, deposes and says:

That I am the affiant in the above entitled matter; that I am over the age of eighteen years, a citizen of the United States, a resident of the County of Marin, San Quentin, California, and sole party to the within PETITION FOR A WRIT OF HABEAS CORPUS.

That I did on the 14 day of September 1964, submit for depositing in the United States Mails at the Post Office at San Quentin, with first-class postage prepaid thereon, a true (copy)(s) of the within document for the following persons; (with exhibits attache to Court's Original and District Attorney of Marin County) and that there is a regular communication by mail between San Quentin and these destinations:

Original & two Copies to:	Clerk's Office, Superior Court Marin County, San Rapheal, Calif
One (1) Copy to:	Clerk's Office, Superior Court Los Angeles, California Dept. 108
One (1) Copy to:	Office of the District Attorney San Rapheal, California
One (1) Copy to:	Attorney General's Office Library & Courts Building Sacramento, California
One (1) Copy to:	Mr. Lawrence E. Wilson, Warden.
One (1) Copy to:	Robert Anderson

I declare under the penalty of perjury that this is correct and true.

Robert Anderson
A-81859
San Quentin, California

Bazell

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MARIN

MATTER OF THE APPLICATION

OF PHXXXXX

vs.

ROBERT ANDERSON

Petitioner

~~Defendant~~

No. 40803

Dept. No. 4

SUBMITTED

Date: Sept 17, 1964 Briefs Yes: _____ No: _____

MINUTE ORDER

Petition received September 17, 1964 at 9:00 A.M.

Petition denied September 17, 1964 at 9:45 A.M.

The within instrument is a correct copy of the original on file in this office.

ATTEST: SEP 26 1967

GEO. H. GNOSS
County Clerk and ex-officio Clerk of the Superior Court of the State of California In and for the County of Marin.
By _____ Deputy Clerk

Dated: Sept 17, 1964

SAMUEL W GARDINER s/
Judge of the Superior Court

F

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAN FRANCISCO

: Anderson, A-81859 Petitioner	PETITION FOR WRIT OF HABEAS CORPUS
Peple of the State of fornia, Lourence E. o, Warden, et. al., Respondent	

he Honorable Justice and Associate Justices of the above entitled
ourt.

, the petitioner in the above cause, who being duly sworn upon
oposes and says that I am an American citizen and over the age
wnty-one (21) years by birth.

he petition of Robert Anderson, respectfully shows: that he, the
etitioner is unlawfully imprisoned, detained, confined and restrained
i liberty by the Warden, Lourence E. Wilson, of Marin County, at
Qentin, Prison, in the State of California: by virtue of presently
lined illegal judgment and sentence. That the illegality thereof
i in this, to wit:

JURISDICTION

he jurisdiction of this Honorable Court is invoked upon, pursuant
3U.S.C.A. 2254; Rule 83.

lated Notice of Appeal was filed in the District Court of Appeal,
Apellate District, Los Angeles County, Oct. 20, 1965, and denied
2, No. Ext. 65-322. Motion For Hearing was filed in the Supreme
t of California, San Francisco, November 29, 1965, and denied Dec-
22, 1965, by post card, case no 2 Ext. 65-322.

Your petitioner was convicted in the Superior Court of the State of
fornia, in and for the County of Los Angeles, on December 16, 1963,
p crime sales of narcotic, a violation of 11501, of the Health and
ty Code.

After entering a plea of guilty, petitioner was subsequently pleaded
a misdemeanor and sentenced to the term prescribed by law, five years
fe, and ten years to life and thereafter received by the California
ctional Authorities where he is presently confined.

STATEMENT OF THE CASE

The alleged crime occured over a period of 3 months. Petitioner's
partner was given some money to buy narcotics by a police officer.
tioner was observed by police walking down the street with a lady.
tioner's crime partner stopped him and his lady friend on the street
d a short conversation. Later his crime partner goes in a hotel,
out and hand the police some narcotic.

Petitioner was arrested on September 6, 1963, on a secret indict-
nd charged with eight (8) counts of Sales of Narcotics. Petitioner
mpromised by police officers and his attorney on seperate occas-
to plead guilty, to Count (7) and they would drop all other counts.
n December 16, 1963, petitioner pled guilty to count (7) seven and
pleaded with a misdemeanor that he had did time for at the Honor Ranch.
tioner was sentenced on his prior and present conviction to: five (5)
to life and ten (10) years to life.

CIRCUMSTANCES

ore important, the interrogating officers not only failed to in-
petitioner of his right to silence, but they also received exception-
damaging information before telling him to plead guilty to count

they would drop the other counts. Petitioner was promised a jail sentence.

ALLEGATIONS

Accordingly, the conduct of interrogating officers had deprived ner of his right to due process of law, and thus impeding con- tional provisions of the sixth and fourteenth Amendments to the States Constitution; and Art. I, Sec. 13, of the California tution.

By failure to apprise him of the privilege against self-incrimin- .

By failure to furnish counsel during interrogation.

he well known criterion supportive to the facts of this case specif- out-lined in People V Dorado, 62 A.C. 351 Id 8. "Defendant's ion was not admissible in evidence where it was made during an gation no longer a general inquiry into an unsolved crime, but on defendant who was then in custody, where the authorities did fectively inform defendant of his right to counsel or absolute o remain silent, where no evidence established his waiver of these and where the authorities process' of interrogation lent to eli- ginecriminating statements." Thus, the Courts recent ruling in this st bear resemblance to the facts of this case.

Accordingly, petitioner rely logically upon the sixth and fourteenth ent of the United States Constitution ; and Art. 1, Sec. 13 of the nia Constitution; for support of his contentions of ineffective entation by counsel. Recent decisions on this subject, infact in- s that counsel has fall far short in effective representations ose V Wilson, (July 1965), Case No. 43395; Howard Regan V Wilson,

1955), Case No. 43149; Hoover v Georgia, 340, U.S. 85; Fra-
Dickson, (9th Cir. 1942), People V Ho Sauvey, 41 Cal. App. 21
., "The record indicates that the appearance was rather pro forma
lous and 'active'".

early as 1928 the Circuit Court of Appeals for the Fourth Circuit
the Supreme Court of West Virginia as correctly stating the foll-
rule:

fore receiving a plea of guilty in a criminal case, the court
should see that it is made by a person of competent intelligence,
freely and voluntarily, and with full understanding of it's na-
ure and effect and of the facts on which it is founded".
que VS U.S. (9th Cir. 1929), 34 F. 2d 57, 58, In the Federal Courts,
rinciple has become a rule; "...The Court... shall not accept the
thout first determining that the plea is made voluntarily with
nding of the nature of the charge..." Rule 11, federal rules
nal procedure, 18 U.S.C.A.

his rule is stated in mandatory language and the court is not
hieved of the duty which it imposes solely because the accused,
here, is represented by counsel of his choice." Emphasis added
, VS Davis (7th Cir. 1954), 212 F. 2d 254, 267; The Court in
inted our real notice of the true nature of the charge against
right granted to the accused by the constitution and it is in-
ble to a valid plea. The understanding of the defendant is not
for conjecture by the court. The language of the case implies
the court to satisfy itself that these requirement are fulfilled.
lea of guilty, unlike a mere admission or extra-judicial confess-
ts every material fact charged and should not be often proper

by counsel and with full understanding of the consequences".
V U.S. (5th Cir. 1959) 265 F. 2d 155, 158.

he increasing concern over the role of the court in accepting a
plea is illustrated by the preliminary draft of the proposed
nts to Rules of Criminal procedure for the United States District
. This draft, submitted in December, 1962, by the committee on
of practice and procedure of the judicial conference of the United
proposes the following amendment to rule 11 for the guidance of
h District Courts:

The Court...shall not accept such plea... without first (a)
making such inquiry as may satisfy it that the defendant in
fact committed the crime charged and (b) addressing the defendant
personally"...

(Proposed Amendment emphasized)

o sanction petitioner's claim of a constitutional violation, see
n V Dono, __U.S. 84 S. Ct. (June 22, 1964. "It is now axiomatic that
ndant in a criminal case is deprived of due process of law if his
ction is founded in whole or in part, upon an involuntary confession,
regards for the truth or falsity of the confession, Rogers V
d, 365 U.S. 534, and even though there is ample evidence aside
he confession to support the conviction".

Moreover, petitioner was paroled and sentenced on a misdemeanor that
completed the sentence on. It is clear, moreover that a prior
ction may be invalidated upon federal habeas corpus by a prisoner
an increased sentence. See United States Ex Rel. Easterling
ns, 303 F. 2d 883, 2d Cir. 1962; United States Ex Rel. Durocher
llo (1964) 330 F. 2d 303.

CONCLUSION

Thus, the Court is endowed with a wide margin in prior
ions, all of which may guide it to just consideration of the
herein. Therefore, failure to construe the facts of this case
ding to probative merits, is failure to observe constitutional
nds; and consequently, is failure to accord petitioner due pro-
of law. As compounded by the many authorities herein contained,
ourts do not recognize degree of illegality when illegality app-
but decide the merits of a given case according to applicable
nd Constitutional Provision. Thus to deny petitioner's conten-
without according him a full hearing on the merits of the case,
assert a degree of illegality, for such a course would surely
legal.

PRAYER

Wherefore, your petitioner prays a writ of Habeas Corpus
, directed to said Warden Lawrence E. Wilson, Commanding him as
said, to have the body of said petitioner before your Honor at
e and place herein to be specified, to do and receive what shall
and there be considered by your Honor concerning petitioner, to-
r with the time and cause of his detention, and said writ, and that
aid petitioner, may be rightfully restored to his liberty.

Subscribe and sworn to before me this 11 day of February,

Respectfully submitted

Robert Anderson

Robert Anderson
P.O. Box A-81859
Tamal, California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

RECEIVED

PETITION FOR WRIT OF HABEAS CORPUS

PERSONS IN STATE CUSTODY

Robert Anderson, A-81859 (Name and Prison Number ny) of Petitioner -vs- le of the State of California ence E. Wilson, Warden, Sol. Respondent	CASE NO._____ (To be supplied by the Clerk of the District Court) DOCKET ADM-SF_____ CIV-SF_____ CR-SF 66-85 Entered by JK Date 1-19-66

****

INSTRUCTIONS - READ CAREFULLY

In order for this petition to receive consideration by the rict Court, it shall be in writing (legibly handwritten or written), signed by the petitioner and verified (notarized), t shall be set forth in concise form the answers to each icable question. If necessary, petitioner may finish his er to a particular question on the reverse side of the page n an additional blank page. Petitioner shall make it clear hich question any such continued answer refers.

Since every petition for habeas corpus must be sworn to r oath any false statement of a material fact therein may e as the basis of prosecution and conviction for perjury. tioners should therefore exercise care to assure that all ers are true and correct.

If the petition is taken in forma pauperis, it shall include ffidavit (attached at the back of the form) setting forth rmation which establishes that petitioner will be unable to the fees and costs of the habeas corpus proceedings. When petition is completed, the original and one copy shall be ed to the Clerk of the District Court for the Northern Dis- t of California, San Francisco, California.

Place of detention: San Quentin, Prison, Jail, California

Name and location of Court which imposed sentence: Superior Court, State of California, County of Los Angeles

The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) Superior Court Nos. 231189 and 278150

(b) Sales of Narcotic 11501, H&S Code & 11501, H&S. Code

(c)

The date upon which sentence was imposed and the terms of the sentence:

(a) on or about Oct. 15, 1960 (Prior) County jail

(b) December 16, 1963, for years to life and 5 to life

(c)

Check whether a finding of guilty was made:

(a) after a plea of not guilty:

(b) after a plea of nolo contendre

(c) after a plea of guilty ✓

If you were found guilty after a plea of not guilty, check whether that finding was made by:

(a) a jury

(b) a judge without a jury ✓

Did you appeal from ~~the~~ judgment of conviction or the imposition of sentence?

If you answered "yes" to (7), list:

(a) The name of each court to which you appealed:

I.

II.

III.

(b) The result in each such court to which you appealed:

I. _____

II. _____

III. _____

(c) The date of each such result:

I. _____

II. _____

III. _____

(d) If known, citations of any written opinion or orders entered pursuant to such results:

I. _____

II. _____

III. _____

If you answered "no" to (7), state your reasons for not so appealing:

(a) I am not versed in law

(b) I did not have any money to hire a lawyer

(c) _____

State concisely the grounds on which you base your allegations that you are being held in custody unlawfully:

(a) Interrogation

(b) A guilty plea on a major crime.

(c) Priored and resentenced on a misdemeanor

State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) I was interrogated by the arresting officers and I was not advised of my constitutional rights to due process of law.

(b) I was forced to plead guilty to a major crime by my lawyer. Ineffective Counsel.

(c) I was priored with a misdemeanor and resentenced on the prior to 5 years to life.

Prior to this petition have you filed with respect to this conviction:

(a) any petition in a State Court for relief from this conviction? Yes

(b) any petitions in State or Federal Courts for habeas corpus? Yes

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions, or applications in this or any other court? No

If you answered "yes" to any part of (12), list with respect to each petition, motion, or application:

(a) the specific nature thereof:

I. Motion For Belated Notice of Appeal

II. Motion For Hearing

III.

IV.

(b) the name and location of the court in which each was filed:

I. District Court, 2nd Appellate District Los Angeles Calif.

II. Supreme Court of the State of California, San Francisco, Calif.

III.

IV.

(c) the disposition thereof:

I. Denied

II. Denied

III.

IV.

(d) the date of each such dispostition:

I. October 22, 1965

II. December 22, 1965

III.

IV.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

I. Post Card (no opinion)

II. Post Card (no opinion)

III.

IV.

Has any ground set forth in (10) been previously presented to this or any other court, State or Federal, in any petition, motion, or application which you have filed?

yes

If you answered "yes" to (14), identify:

(a) which grounds have been previously presented:

I. Due Process of law

II. Ineffective Counsel

III. Misdemeanor Prior

IV.

(b) the proceedings in which each ground was raised:

I. Due Process of Law

II. Ineffective Counsel

III. Misdemeanor Prior

IV. _____

If any ground set forth in said (10) has not previously been presented to any court, State or Federal, set forth the ground and state consicely the reasons why such ground has not been previously presented:

(a)

(b)

(c)

Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction of the imposition of sentence? I did not appeal

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

If you answered "yes" to one or more of (17), list:

(a) the name and address of each attorney who represented you:

I. F. H. Spindell

II. F. H. Spindell

III. F. H. Spindell

(b) the proceedings at which each such attorney represented you:

I. Plea

II. sentencing

III.

If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? yes

Robert Anderson
SIGNATURE OF AFFIANT

Notary Seal

TE OF CALIFORNIA
NTY OF MARIN } ss: FORMA PAUPERIS AFFIDAVIT

I, Robert Anderson, petitioner in the above itled cause, am an indigent person, and a citizen of the United tes, over the age of twenty-one (21) years; that he is unable to pay the fee of, or to file a petition for a writ of habeas cor- ; and papers in support thereof, or to hire counsel to prosecute d writ; that he is without funds, or anything of value with which pay or secure the cost necessary to prosecute said petition and proceedings in connection therewith; that affiant believes he a good and just cause of action, and therefore prays that this rt permit him to proceed in the above-entitled cause without pre- ing the costs required by this Court in such cases, and that urity for same be waived by virtue of his indigent circumstances.

I certify under penalty of perjury that the foregoing is true correct.

Robert Anderson
SIGNATURE OF PETITIONER

TE OF CALIFORNIA
NTY OF MARIN } ss: VERIFICATION

Robert Anderson, being first sworn under oath, pre- ts that he has subscribed to the above and does state that the ormation therein is true and correct to the best of his knowledge belief.

Robert Anderson
SIGNATURE OF AFFIANT

Attorney General

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Robert Anderson Petitioner VS People of The State of California, Lawrence E. Wilson, Warden, et. al., Respondents	PETITION FOR A WRIT OF HABEAS CORPUS. NO. _____

JURISDICTION 28 U.S.C.A. 2254; Rule 83

To: The Honorable Justice and Associate Justices of The above entitled Court.

I, the petitioner in the above cause, who being duly sworn upon oath deposes and says that I am an American citizen and over the age of twenty-one (21) years by birth.

The petition of Robert Anderson, respectfully shows: that he, the said petitioner is unlawfully imprisoned, detained, confined, and restrained of his liberty by the Warden Lawrence E. Wilson, of Marin County, at San Quentin Prison, in the State of California: by virtue of presently complained illegal judgment. That the illegality thereof consist in this, to wit:

Belated Notice of Appeal was filed in the District Court of Appeal, 2nd Appellate District, Los Angeles, County, Oct. 20, 1965, and denied Oct. 28, 1965, by post card, case no. Ext. 65-322. Motion For Hearing was filed in the Supreme Court of California, San Francisco, November 29, 1965, and denied December 22, 1965, by Post Card, case no. 2 Ext. 65-322.

Your petitioner was convicted in the Superior Court of the State of California, in and for the County of Los Angeles, on December 16, 1963, of the crime sales of Narcotic, a violation of 11501 of the Health and Safety Code.

After entering a plea of guilty, petitioner was subsequently priored with a misdemeanor [illegible] to the term prescribed by law, five years to life, and [illegible] to life and thereafter

/1/

received by the California Correctional Authorities where he is presently confined.

STATEMENT OF THE CASE

The alleged crime occured over a period of 3 months. Petitioner's crime partner was given some money to buy narcotics by a police officer. Petitioner was observed by police walking down the street with a lady. Petitioner's crime partner stopped him and his lady friend on the street and had a short conversation. Later his crime partner goes in the hotel, comes out and hand the police some narcotics.

Petitioner was arrested on September 6, 1963, on a secret indictment and charged with eight (8) counts of Sales of Narcotic. Petitioner was compromised by police officers and his attorney on separate occasion to plead guilty, to Count (7) and they would drop all other counts. On December 16, 1963, petitioner pled guilty to count (7) seven and was priored with a misdemeanor that he had did time for at the Honor Rancho. Petitioner was sentenced on his prior and present conviction to: five (5) years to life and ten (10) years to life.

CIRCUMSTANCES

More important, the interrogating officers not only failed to inform petitioner of his right to silence, but they also received exceptionally damaging information before telling him to plead guilty to Count seven (7) and they would drop the other counts. Petitioner was promised a county jail sentence.

ALLEGATIONS

Accordingly, the conduct of interrogating officers has deprived petitioner of his right to due process of law, and thus impeding constitutional provisions of the sixth and fourteenth Amendments to the United States Constitution; and Art. 1, Sec. 13 of the California Constitution.

1. By failure to apprise him of the privilege against self-

incrimination.

2. By failure to furnish counsel during interrogation.

The well known criterion supportive to the facts of this case specifically out-lined in People V. Dorado, 62 A.C. 351 Id 8. "Defendant's confession was not admissible in evidence where it was made during an investigation no longer a general inquiry into an unsolved crime, but focused on defendant who was then in custody, where the authorities did not effectively inform defendant of his right to counsel or absolute right to remain silent, where no evidence established his waiver of these rights, and where the authorities process of interrogation lent to eliciting incriminating statement". Thus, the Courts recent ruling in this area must bear resemblance to the facts of this case.

Accordingly, petitioner rely logically upon the sixth and fourteenth Amendment of the United States Constitution; and Art. 1, Sec. 13 of the California Constitution; for support of his contentions of ineffective representation by counsel. Recent decisions on this subject, infact informs us that counsel has fell short in effective representation: Glenn Rose v. Wilson, (July, 1965), Case no. 43395; Howard Regan v. Wilson, (July 7, 1965), case no. 43169; Reeves v. Georgia, 350 U.S. 85; Brubaker v. Dickson, (9th Cir. 1962), 310 F. 2d 30; Eubanks v. U.S. (9th Cir. 1964), 336 F. 2d 269; People v. McGarvey, 61 Cal. App. 2d 557, 561, "The record indicate that the appearance was rather pro forma 'than zealous and active."

As early as 1929 the Circuit Court of Appeals for the Fourth Circuit quoted the Supreme Court of West Virginia as correctly stating the following rule:

> "Before receiving a plea of guilty in a criminal case, the court should see that it is made by a person of competent intelligence, freely and voluntarily, and with full understanding of it's nature and effect and of the fact on which

it is founded".

Fogue vs. U.S. (9th Cir. 1929), 34 F. 2d 97, 98, In the Federal Courts, this principle has become a rule; "...The Court... shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge ..." Rule 11, federal rules of Criminal Procedure, 18 U.S.C.A.

"This rule is stated in mandatory language and the court is not relieved of the duty which it imposes solely because the accused, as here, is represented by counsel of his choice." (Emphasis added)

U.S. vs Davis (7th Cir. 1954), 212 F. 2d 264, 267; The Court in Davis pointed out real notice of the true nature of the charge against him is a right granted to the accused by the Constitution and it is indispensable to a valid plea. The understanding of the defendant is not a matter for conjecture by the Court. The language of the case implies a duty on the Court to satisfy itself that these requirement are fulfilled.

"A plea of guilty, unlike a mere admission or extra-judicial confession, admits every material fact charged and should not be after proper advise by counsel and with full understanding of the Consequences". Julian v. U.S. (6th Cir. 1956). 236 F. 2d 155, 158.

The increasing concern over the role of the court in accepting a guilty plea is illustrated by the preliminary draft of the proposed amendments to rules of criminal procedure for the United States District Courts. This draft, submitted in December, 1962, by the committee on rules of practice and procedure of the judical conference of the United States proposes the following amendment to rule 11 for the guidance of federal district courts:

"The Court...shall not accept such plea... without first (a) <u>making such inquiry as may satisfy it that the defendant in fact committed the crime charged and</u> (b) <u>addressing the</u>

defendant personally..." (Proposed Amendment emphasized)

To sanction petitioner's claim of a constitutional violation, see Jackson v. Denno, __ U.S. 84 S. Ct. (June 22, 1964. "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded in whole or in part, upon an involuntary confession, without regards for the truth or falsity of the confession, Rogers v. Richmond, 365 U.S. 534, and even though there is ample evidence aside from the confession to support the conviction".

Moreover, petitioner was priored and sentenced on a misdemeanor that he had completed the sentence on. It is clear, moreover that a prior conviction may be invalidated upon federal habeas corpus by a prisoner serving an increased sentence. See United States Ex Rel. Esterling v. Wilkins, 303 F. 2d 883, 2d Cir. 1962; United States Ex Rel. Durocher v. La Valle (1964) 330 F. 2d 303.

CONCLUSION

Thus, the Court is endowed with a wide margin in prior decisions, all of which may guide it to just consideration of the facts herein. Therefore, failure to construe the facts of this case according to probative merits, is failure to observe constitutional commands; and consequently, is failure to accord petitioner due process of law. As expounded by the many authorities herein contained, the Courts do not recognize degrees of illegality when illegality appears, but decide the merits of a given case according to applicable law and constitutional provision. Thus to deny petitioner's contentions without according him a full hearing on the merits of the case, is to assert a degree of illegality, for such a course would surely be illegal.

PRAYER

Wherefore, your petitioner prays a writ of Habeas Corpus issue, directed to said Warden Lawrence E. Wilson, Commanding him

as aforesaid, to have the body of said petitioner before your Honor concerning petitioner at a time and place herein to be specified, to do and receive what shall then and there be considered by your Honor concerning petitioner, together with the time and cause of his detention, and said writ, and that he, said petitioner, may be rightfully restored to his liberty.

Subscribed and sworn to before me this 14 day of January, 1966.

Respectfully submitted

Robert Anderson

Robert Anderson
P.O. Box A-81859
Tamal, California

as aforesaid, to have the body of said petitioner before your Honor concerning petitioner at a time and place herein to be specified, to do and receive what shall then and there be considered by your Honor concerning petitioner, together with the time and cause of his detention, and said writ, and that he, said petitioner, may be rightfully restored to his liberty.

Subscribed and sworn to before me this 14 day of January, 1966.

Respectfully submitted

Robert Anderson

Robert Anderson
P.O. Box A-81859
Tamal, California

File

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

ROBERT ANDERSON Petitioner v PEOPLE OF THE STATE OF CALIFORNIA, LAWRENCE E. WILSON, Warden, et al Respondents	No. MISC 1303 **ORDER**

Petitioner has submitted to this court a motion seeking permission to file his application for a writ of habeas corpus in forma pauperis. His proposed petition does not allege exhaustion of state remedies, as required by Title 28 USCA §2254 and it contains no allegations which bring the proposed proceeding within any exception referred to in said §2254.

It is, therefore, ORDERED that petitioner's motion to file his application for a writ of habeas corpus in forma pauperis be, and the same is, hereby DENIED.

Dated: January 20, 1966

LLOYD H. BURKE

United States District Judge

I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

PETITION FOR WRIT OF HABEAS CORPUS

PERSONS IN STATE CUSTODY

[illegible]	CASE NO._____
[illegible] and Prison Number y) of Petitioner - vs - [illegible]	(To be supplied by the Clerk of the District Court)
f Respondent	66-940

INSTRUCTIONS - READ CAREFULLY

n order for this petition to receive consideration by the ct Court, it shall be in writing (legibly handwritten or itten), signed by the petitioner and verified (notarized), shall be set forth in concise form the answers to each able question. If necessary, petitioner may finish his to a particular question on the reverse side of the page an additional blank page. Petitioner shall make it clear ch question any such continued answer refers.

Since every petition for habeas corpus must be sworn to oath any false statement of a material fact therein may as the basis of prosecution and conviction for perjury. oners should therefore exercise care to assure that all rs are true and correct.

If the petition is taken in forma pauperis, it shall include fidavit (attached at the back of the form) setting forth nation which establishes that petitioner will be unable to he fees and costs of the habeas corpus proceedings. When etition is completed, the original and one copy shall be l to the Clerk of the District Court for the Northern Dis- of California, San Francisco, California.

Place of detention: San Quentin Prison Island, California

Name and location of Court which imposed sentence: Superior Court, State of California, County of Los Angeles

The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) P.C. Sec. 273150 and 273184

(b) 11501 H&S Code and 11501 H&S Code

(c)

The date upon which sentence was imposed and the terms of the sentence:

(a) on or about October 15, 1960 (Prior) County

(b) jail time and resentenced to 5 years life.

(c) December 16, 1963; 10 yrs to life

Check whether a finding of guilty was made:

(a) after a plea of not guilty:

(b) after a plea of nolo contendre:

(c) after a plea of guilty: ✓

If you were found guilty after a plea of not guilty, check whether that finding was made by:

(a) a jury.

(b) a judge without a jury ✓

Did you appeal from the judgment of conviction or the imposition of sentence?

If you answered "yes" to (7), list:

(a) The name of each court to which you appealed:

I.

II.

III.

(b) The result in each such court to which you appealed:

I. _____

II. _____

III. _____

(c) The date of each such result:

I. _____

II. _____

III. _____

(d) If known, citations of any written opinion or orders entered pursuant to such results:

I. _____

II. _____

III. _____

If you answered "no" to (7), state your reasons for not so appealing:

(a) I am not versed in law

(b) I did not have any money to hire a lawyer

(c) _____

State concisely the grounds on which you base your allegations that you are being held in custody unlawfully:

(a) Interrogation

(b) A plea of guilty to a major crime

(c) Priored and resentenced on a misdemeanor

State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) I was interrogated by police officers, and I was not advised of my Constitutional rights to due process of law

(b) I was forced to plead guilty to a major crime by my attorney.

(c) I was priored with a misdemeanor and resentenced on the prior to 5 years to life, after the County jail sentence was completed.

Prior to this petition have you filed with respect to this conviction:

(a) any petition in a State Court for relief from this conviction? yes

(b) any petitions in State or Federal Courts for habeas corpus? yes

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions, or applications in this or any other court? No

If you answered "yes" to any part of (12), list with respect to each petition, motion, or application:

(a) the specific nature thereof:

I. Motion for Belated Notice of Appeal

II. Motion for Hearing

III. Habeas Corpus

IV.

(b) the name and location of the court in which each was filed:

I. District Court, 2nd App. Dist. Los Angeles, Calif.

II. Supreme Court of the State of Calif. San Francisco, Calif.

III. Supreme Court of the State of Calif. San Francisco, Calif.

IV.

(c) the disposition thereof:

I. Denied

II. Denied

III. Denied

IV. _____

(d) the date of each such disposition:

I. October 25, 1965

II. December 22, 1965

III. March 30, 1966

IV. _____

(e) If known, citations of any written opinions or orders entered pursuant to each such disposition:

I. Post Card (no opinion)

II. Post Card (no opinion)

III. Post Card (no opinion)

IV. _____

Has any ground set forth in (10) been previously presented to this or any other court, State or Federal, in any petition, motion, or application which you have filed? _____

If you answered "yes" to (14), identify:

(a) which grounds have been previously presented:

I. Guilty Plea

II. Ineffective Counsel

III. Prior P.C.

IV. _____

(b) the proceedings in which each ground was raised:

I. Habeas Corpus

II. Habeas Corpus

III. Habeas Corpus

IV. /

If any ground set forth in said (10) has not previously been presented to any court, State or Federal, set forth the ground and state consicely the reasons why such ground has not been previously presented:

(a)

(b)

(c)

Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) Your sentencing? yes

(d) your appeal, if any, from the judgment of conviction of the imposition of sentence? [illegible]

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed: no

If you answered "yes" to one or more of (17), list:

(a) the name and address of each attorney who represented you:

I. [illegible]

II. [illegible]

III.

(b) the proceedings at which each such attorney represented you:

I. Plea

II. Sentencing

III.

If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)?

yes

Robert Anderson
SIGNATURE OF AFFIANT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

TE OF CALIFORNIA)
: ss: FORMA PAUPERIS AFFIDAVIT
NTY OF MARIN)

I, Robert Anderson, petitioner in the above itled cause, am an indigent person, and a citizen of the United tes, over the age of twenty-one (21) years; that he is unable prepay the fee of, or to file a petition for a writ of habeas pus; and papers in support thereof, or to hire counsel to pro- ute said writ; that he is without funds, or anything of value h which to pay or secure the cost necessary to prosecute said ition and the proceedings in connection therewith; that affiant ieves he has a good and just cause of action, and therefore ys that this Court permit him to proceed in the above-entitled se without pre-paying the costs required by this Court in such es, and that security for same be waived by virtue of his indi- t circumstances.

I certify under penalty of perjury that the foregoing is true correct.

Robert Anderson
(Signature of Petitioner, affiant)

TE OF CALIFORNIA)
: ss: VERIFICATION
NTY OF MARIN)

Robert Anderson, being first sworn under oath, pre- ts that he has subscribed to the above and does state that the ormation therein is true and correct to the best of his know- ge and belief.

Robert Anderson
(Signature of Petitioner, affiant)

E: JUNE 8 1966

Original

ORIGINAL
FILED

JUN 24 1966

CLERK, U. S. DIST. COURT
SAN FRANCISCO

66-940

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

- - - - - - -

ROBERT ANDERSON, Petitioner, vs. PEOPLE OF THE STATE OF CALIFORNIA, L. E. WILSON, Warden, et al., Respondents.	)	45311 NO. ORDER

Upon reading the affidavit of Robert Anderson in forma pauperis, IT IS ORDERED that said petitioner be and he is hereby allowed to file his petition for writ of habeas corpus without prepayment of fees.

Petitioner is presently confined at the California State Prison, San uentin, California pursuant to what appears to be a 1960 conviction for a violation of §11501 of the California Health and Safety Code. Petitioner recites that he was represented by counsel and entered a plea of guilty. No appeal was taken.

K

It is alleged by petitioner that his counsel forced him to plead guilty; that he was not advised of his constitutional rights by the arresting officers and that he was sentenced on the same charge twice.

This court has consistently followed a policy of liberally construing the pleadings of unskilled petitioners. In this case however, the application contains nothing more than conclusionary allegations unsupported by even the barest statement of facts. As such, this petition fails to comport with the minimum requirements of 28 U.S.C.A. §2242.

Accordingly, this petition for writ of habeas corpus must be and is hereby DENIED.

Dated: June 21 1966

ALBERT C. WOLLENBERG
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

- - - - - - -

ROBERT ANDERSON, Petitioner, vs. LAWRENCE E. WILSON, Warden, People of the State of California, et al., Respondent.	CASE NO. 45311 ORDER

Petitioner seeks a rehearing in the above titled petition. The original application was denied on grounds petitioner failed to state any facts upon which this court could act. The same defect is apparent in the instant motion. Petitioner is advised to concern himself less with attempting to conform his case with the pronouncements of the U. S. Supreme Court and direct his efforts toward writing a brief statement of the facts of his conviction.

Until that is accomplished no consideration will be given to petitioner's claims. It would be well to remember that the burden rests on the shoulders of the one attacking the validity of a conviction to establish a prima facie case.

Accordingly, this motion for rehearing is DENIED.

Dated: July 26 1966

ALBERT C. WOLLENBERG
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELIJAH DuBOSE, Appellant, vs. MATSON NAVIGATION COMPANY, a corporation, Appellee.	)	No. 22074

APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELIJAH DuBOSE, Appellant, vs. MATSON NAVIGATION COMPANY, a corporation, Appellee.	)	No. 22074

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

This is an appeal by a seaman from that portion of the judgment below which found him 75% contributorily negligent (TR 118, L.5, Clerk's Transcript, 78), and from Finding of Fact number 8 (Clerk's Transcript, 78), and Conclusions of Law numbers 4 and 5 (Clerk's Transcript, 79).[1/] Jurisdiction of the court below is granted pursuant to the provisions of the Jones Act, 46 USC, Section 688, and under the general maritime law. The jurisdiction of this court is granted by the provisions

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1. Appellant is not appealing the remainder of the lower Court's Findings of Fact and Conclusions of Law, or the remaining portion of the judgment not specifically referred to.

of Title 28 USC 1291, which gives to this court jurisdiction of all appeals from final decrees of District Courts of the United States.

SPECIFICATION OF ERRORS RELIED UPON

1. This court can, and must, review the District Court's finding that appellant was guilty of 75% contributory negligence on two grounds. First, it is clearly erroneous, and, second, this court is in as good a position as the court below to evaluate the testimony on this crucial issue.

2. The District Court's finding of contributory negligence by appellant because of his failure to get off the vessel, ask for a transfer of jobs, or make complaints to the ship's officers when he did not know of ultimate serious consequences of his injury, suffered as a result of appellee's negligence and the vessel's unseaworthiness, was improper and tantamount to a finding of assumption of risk by appellant.

3. Even if the Court were justified in making a finding of contributory negligence on the part of the appellant, a finding of 75% under the circumstances of this case is clearly erroneous and is not supported by the evidence.

STATEMENT OF THE CASE

Elijah DuBose, a forty-four year-old seaman with a tenth grade education (TR 3, L.22) signed on the SS MATSONIA on January 28, 1961, as a scullion (TR 7, L.14). He left the vessel on April 5, 1961 (TR 6, L.19-20, Plaintiff's Exhibit 1). His earnings were approximately $500.00 a month (TR 40, L.5). His assignment on the vessel was that of "silverman" in the ship's galley (TR 8, L.3). His duties as a "silverman" consisted of cleaning and polishing all of the large silverware and the silver coffee pots (TR 8, L.6). Appellant had to do his work in the dish and glassware washing room (Plaintiff's Exhibits 2(a), (b), (c) and (d)). In his working quarters, Mr. DuBose was furnished with a counter on which he polished the large silverware, two sinks for washing the silver, and a silver polishing machine (TR 8, L.16-19).[2/] Clean dishracks were kept on the table directly in back of the area where plaintiff was polishing the silver (TR 13, L.3, 24). Appellant generally stood near, and in front of, the two sinks ("E" on

---

2. On Plaintiff's Exhibit 2(a), 2(b), 2(c) and 2(d), the polishing machine is marked "PM," the two sinks are "S1" and "S2", the table for the racks is "TR" and the racks for coffee pots, "RC".

any complaint to the ship's officers as he likened these bumpings to a "hand bump . . . you just ignore it" (TR 55, L.11-14). He had to do his work by standing in the confined area, and ". . .(t)hey had to be passing by. There was no other way for them to get by to do their work" (TR 31, L.2-5). Although Mr. DuBose testified that he "could have" gotten off the ship "anytime he wanted" (TR 51, L.20), he stayed aboard as ". . . that was my job there, so I stayed and did it" (TR 105, L.5).

Having worked on the vessel for a period of time, he noted that his right leg was feeling numb (TR 31, L.20). As he rubbed the outside portion of his right lower leg, he further noted a knot on the back of his leg (TR 32, L.3-15). He had not noticed any numbness in his leg before this (TR 33, L.16), had no prior trouble with his leg (TR 32, L.21), and had no trouble in passing his pre-sign on physical (TR 32, L.23, TR 33, L.8). He clearly did not realize, or have notice of, the seriousness of what was happening as a result of the bumps until after he left the vessel (TR 105, L.1-11). He reported to the San Francisco Marine Hospital where surgery for his injured leg was performed on May 1, 1961, and it was placed in a cast. Following the surgery, appellant contracted a "drop" foot. He was required to wear a metal leg brace (Plaintiff's Exhibit 6) for about four and a half months, i.e., until

September 15, 1961. Thereafter, he wore the brace intermittently for approximately five years more, i.e., until August, 1966 (TR 44, L.13 - TR 45, L.19). He returned to work on December 8, 1961 (TR 37, L.25), at which time he joined the SS NEW MARKET. He left that vessel on March 10, 1962, partly because he had to return to the Marine Hospital for a follow-up examination (TR 42, L.16-23).

Since his return to work, his leg has troubled him, for it was numb and weak and his foot and ankle were painful (TR 43, L.7). He was, however, able to perform his work despite his leg disability (TR 46, L.4). He is still suffering numbness, he has a stinging sensation on the outside of his leg (TR 43, L.50), and he has trouble sleeping on his right side and on his back because of pain in his ankle (TR 44, L.8).

ARGUMENT

I

THIS COURT CAN, AND MUST, REVIEW THE DISTRICT COURT'S FINDING THAT APPELLANT WAS GUILTY OF 75% CONTRIBUTORY NEGLIGENCE ON TWO GROUNDS. FIRST, IT IS CLEARLY ERRONEOUS, AND, SECOND, THIS COURT IS IN AS GOOD A POSITION AS THE COURT BELOW TO EVALUATE THE TESTIMONY ON THIS CRUCIAL ISSUE

The District Court's finding that there was 75% contributory negligence by appellant is reviewable in this Honorable Court on two grounds: (1) It is a clearly

erroneous finding not supported by the evidence; (2) This Court is in as good a position as the lower court to evaluate the testimony.

The United States Supreme Court has defined a finding of "clearly erroneous" as:

> "Although there is evidence to support it, the reviewing court on the entire evidence is left to the definite and firm conviction that a mistake has been committed", McAllister v. United States (1954) 348 U.S. 19

It is clear that such a mistake was committed by the court below.

The District Court found that: plaintiff made no request to be transferred to another job or to another location, did not complain to his Union delegate or to any of the ship's officers (but he did complain to the dish runners who were bumping him), and that he was not required to stay aboard the vessel and could have terminated his employment at any time the vessel reached port.[3] Since there was no other finding relevant, it is apparently on that basis that the District Court made its finding that appellant was 75% contributorily negligent. Appellant is not required, as will be shown hereafter, to leave his job

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3. Finding of Fact No. 6 (Clerk's Transcript, 78)

because of a dangerous and unsafe condition aboard the vessel of which he had knowledge, particularly where the injuries are such that they would not arouse any concern on his part in the first place. As long as the appellant remains on articles, he is not permitted to leave the vessel except under penalties, 46 USC 701.[4/]

This Court is in as good a position as the lower court to evaluate the testimony that is crucial to the instant case, San Pedro Campania Armadoras v.

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4. "§701. Various offenses; penalties

"Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:

"First. For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.

"Second. For neglecting or refusing without reasonable cause to join his vessel or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of the voyage, or for absence at any time without leave and without sufficient reason from his vessel and from his duty, not amounting to desertion, by forfeiture from his wages of not more then two days' pay or sufficient to defray any expenses which shall have been properly incurred in hiring a substitute.

"Third. For quitting the vessel without leave, after her arrival at the port of her delivery and before she is placed in security, by forfeiture from his wages of not more than one month's pay."

Yannacopoulos (5th Cir. 1956) 357 F.2d 737; Kulukundis v. Strand (9th Cir. 1953) 202 F.2d 708; Tawada v. United States (9th Cir. 1947) 162 F.2d 615. The only witness that testified on the issue of liability was appellant who was specifically found to be a credible and honest witness by the District Court (TR 115, L.80-81; TR 118, L.17-21). Appellant's testimony is in the transcript and is as available to this court as to the court below.

II

THE DISTRICT COURT'S FINDING OF CONTRIBUTORY NEGLIGENCE BY APPELLANT BECAUSE OF HIS FAILURE TO GET OFF THE VESSEL, ASK FOR A TRANSFER OF JOBS, OR MAKE COMPLAINTS TO THE SHIP'S OFFICERS WHEN HE DID NOT KNOW OF ULTIMATE SERIOUS CONSEQUENCES OF HIS INJURY, SUFFERED AS A RESULT OF APPELLEE'S NEGLIGENCE AND THE VESSEL'S UNSEAWORTHINESS, WAS IMPROPER AND TANTAMOUNT TO A FINDING OF ASSUMPTION OF RISK BY APPELLANT

The Court made the following finding of fact:[5]

> "Plaintiff made no request to be transferred into another job or another location. He never complained to his union delegate with regard to the bumping. He neither reported the bumpings nor did he complain about them to any of the ship's officers or medical staff. However, on at least one occasion and perhaps on several occasions, he complained to the dish runners who were bumping him. Plaintiff was not required to stay aboard the vessel and he

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5. Finding of Fact No. 6 (Clerk's Transcript, 78)

"could have terminated his employment at any time the vessel reached port."

Plaintiff was not required to ask to be transferred to another job or to another location, and his not having done so was not contributory negligence. He was unaware of the seriousness of the bumpings. He did not complain to his union delegate or the vessel's officers because he thought nothing of the bumpings at the time, and likened it to "Bump your hand and it might hurt for a minute and you just ignore it " (TR 55, L.11-14). Appellant was at all times, prior to his diagnosed injury, unaware that the apparently harmless bumpings would lead to a serious leg disability (TR 55, L.105; TR 105, L.1-11). He did, however, make complaints to the dish runners, more out of annoyance than recognition of the seriousness of the injury to him.[6/] Appellant was under no requirement to change his working conditions, and remaining on the job does not constitute contributory negligence. In Koshorek v. Pennsylvania Railroad Co. (3rd Cir. 1963) 318 F.2d 364, Koshorek, an FELA railroad employee, developed lung symptoms because he remained on his job in

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6. Appellant testified as to what he told the dish runners: "Why, I just raised Sam with them." (TR 30, L.19)

the passenger shop over a period of time where dust and sand were blown about. The railroad was found to be negligent in failing to mitigate or prevent the hazard. In holding that Koshorek did not assume the risk by remaining on the job, the court said, at page 376, (citing Prosser on Torts, Sec. 55):

> "The retention of the doctrine of comparative negligence and the abrogation of the defense of assumption of risk necessitates that a careful distinction between the two concepts be made in a case such as that at bar arising under the Act. If Koshorek's own conduct in relation to his injury be characterized as contributory negligence the Railroad may have a partial defense as to the amount of damages. If the same conduct be found to have constituted assumption of risk Koshorek's right to recover could not be affected in any respect. In Prosser, Torts §55 (1955), 304-305, it is stated: '* * * [W]here the two defenses overlap, there is a great deal of confusion of the two. Ordinarily it makes little difference which the defense is called. The distinction may become important, however, under such statutes as the Federal Employers' Liability Act, which has now abrogated the defense of assumption of risk entirely, but has left, contributory negligence as a partial defense reducing the amount of recovery. In working out the distinction, the courts have arrived at the conclusion <u>that assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct, however unwilling or protesting the plaintiff may be</u>. The two may co-exist, or either may exist without the other. The difference is frequently one between risks which were in fact known to the plaintiff, or so obvious that he must be taken

"to have known of them, and risks which he merely might have discovered by the exercise of ordinary care.' See also Potter v. Brittan, 286 F.2d 521 (3 Cir. 1961)." (Emphasis Added)

The Court below, it is respectfully urged, confused contributory negligence with assumption of risk. Assumption of risk has no place in maritime law since the Supreme Court decision of Socony Vacuum Oil Co. v. Smith (1939) 305 U.S. 424; Fonsell v. N.Y. Dock Railway (D.C.E.D. N.Y. 1961), 198 F.Supp. 332. In Socony Vacuum, supra, use of a defective appliance by a seaman while knowing it was defective was held not to constitute assumption of risk by the seaman. Said the court at page 430:

> "The seaman while on his vessel is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment. He cannot leave the vessel while at sea. Abandonment of it in port before his discharge, to avoid unnecessary dangers of employment, exposes him to the risk of loss of pay and to the penalties for desertion. In the performance of his duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action. Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special

even if there are unseaworthy conditions of which he is aware. The fact that Mr. DuBose knew of the defective working conditions does not justify a finding of contributory negligence against him, for such a finding below is tantamount to holding that he assumed the risk of the defective working condition, Smith v. United States (4th Cir. 1964) 336 F.2d 165; Movible Offshore Co. v. Ousley (5th Cir. 1965) 346 F.2d 870; Hildebrand v. United States (D.C.S.D. N.Y. 1954) 134 F.Supp. 514, affm'd (2nd Cir. 1955) 226 F.2d 215. Nor can appellant be charged with assumption of risk under another name, San Pedro Compania Armadoras v. Yannacopoulos, supra; Smith v. United States, supra; Holley v. The Manfred Stansfield (4th Cir. 1959) 269 F.2d 317.

The District Court also found that Mr. DuBose was not required to stay aboard the vessel and could have terminated his employment. It based this finding, presumably, on DuBose's own testimony (TR 51, L.20). Appellant, however, was in error when he testified (as he did) that he could have left the vessel "at any time." This court must take judicial notice of the fact that when a seaman is aboard a vessel and on articles, he cannot leave the vessel without penalties, 46 USC §701. From his Coast Guard discharge (Plaintiff's Exhibit No. 1),

it is clear that even if appellant had realized the seriousness of the bumpings, when he did not, he could not effectively have left the vessel "at any time."

III

EVEN IF THE COURT WERE JUSTIFIED IN MAKING A FINDING OF CONTRIBUTORY NEGLIGENCE ON THE PART OF THE APPELLANT, A FINDING OF 75% UNDER THE CIRCUMSTANCES OF THIS CASE IS CLEARLY ERRONEOUS AND IS NOT SUPPORTED BY THE EVIDENCE

The Court in its concluding remarks indicated that:

> "This man had to get the silver cleaned in the place assigned to him. Taking into account the motion of the sea, the confined quarters there, the dimensions of the racks and so on and so forth, it was almost tailor-made that the racks carried by the dishrunners would bump him, probably on the outside of his right knee, as they were carrying the racks to the galley. It could have been almost a built-in condition for that, it seems to me." (TR 116, L.7-14)

Very few are the cases that make a finding of contributory negligence of 75%. There must be an extreme finding of neglect by the seaman to justify such a finding, Ktistakis v. United Cross Nav. Corp. (2nd Cir. 1963) 324 F.2d 728; Asand v. Parisi (1st Cir. 1962) 297 F.2d 859. To hold that plaintiff's remaining on board the vessel constituted 75% contributory negligence is clearly not supported by the evidence, and the District Court must therefore be reversed.

APPENDIX

Exhibits Admitted as Evidence in the Court Below[8/]

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B	Records of Sailing and Termination Notice	100
C	Records of San Pedro Clinic	101

8. Pages refer to the Reporter's Transcript where the exhibit is identified and received into evidence

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 + 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with these rules.

Dated: October 24, 1967
San Francisco, California

KENNETH W. ROSENTHAL

22074

No. ~~29010~~

In the

United States Court of Appeals

For the Ninth Circuit

ELIJAH DU BOSE, *Plaintiff,* vs. MATSON NAVIGATION COMPANY, *Defendant.*	

Brief of Appellee Matson Navigation Company

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No. 29010

In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

ELIJAH DU BOSE,

Appellant,

vs.

MATSON NAVIGATION COMPANY, a corporation,

Appellee.

Brief of Appellee
Matson Navigation Company

JURISDICTIONAL STATEMENT

Jurisdiction of the court below is granted pursuant to the provisions of the Jones Act, 46 USC, Section 688, and under the general maritime law. The jurisdiction of this court is granted by the provisions of Title 28 USC 1291, which gives to this court jurisdiction of all appeals from final decrees of District Courts of the United States.

No. 29010

In the

United States Court of Appeals

For the Ninth Circuit

ELIJAH DU BOSE, *Plaintiff,* vs. MATSON NAVIGATION COMPANY, *Defendant.*	

Brief of Appellee Matson Navigation Company

PRELIMINARY STATEMENT

The Court below, after a complete hearing on the merits, rendered a judgment which, assuming that any award should have been made, amply compensated appellant. The appellant's real complaint before this Court is not lack of adequate compensation for a minor injury but is rather an attack on the District Court's use of the standard admiralty formula of applying comparative negligence in arriving at the ultimate award. We will show that the trial court properly found the appellant guilty of contributory negligence, and that the amount awarded was adequate, if not generous.

STATEMENT OF THE CASE

There appears no real reason for a lengthy statement of the case, save to set forth the facts upon which the trial court correctly rested its finding of contributory negligence.

Appellant was an experienced seaman who had been going to sea since 1943 (R.T. p. 5, lines 4-14).* He signed aboard the *SS Matsonia* on January 28, 1961 and remained aboard the vessel until April 5, 1961 (R.T. p. 6, lines 19-20). Appellant left the vessel in April only because he had served the maximum time aboard and therefore was removed by the Union (R.T. p. 100, lines 7-15).

Appellant worked as one of a number of scullions aboard the vessel and was assigned the specific task of polishing silver (R.T. p. 7, lines 12-23). During the course of his employment, other scullions carrying dish racks passed behind appellant while he worked. On many occasions these scullions would bump their dish racks against appellant's right knee causing injury (R.T. p. 28, lines 9-25). On one occasion appellant received a particularly hard bump on his right knee from a seaman by the name of Calvin Jerry (R.T. p. 54, lines 4-9). Finally, in early March of 1961, appellant went to the doctor aboard the vessel and complained of the injury to his knee (R.T. p. 33, lines 17-21).

On March 13, 1961, appellant went to the Public Health Service Hospital in San Francisco complaining of the injury to his knee (Appellant's Exhibit 4). Appellant returned to the vessel and continued working until required to leave by the Union rule.

Appellant testified that he never complained to his Union delegate about the repeated trauma which caused the injury

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*Reference to the Reporter's Transcript is "R.T."
Reference to the Clerk's Transcript is "C.T."
Reference to Appellant's Brief is "B.R."

(R.T. p. 102, lines 11-13). He never reported the bumping incidents to any of the ship's officers (R.T. p. 102, lines 14-15). He never requested to be transferred to another job (R.T. p. 102, lines 7-10). Finally appellant admitted that he was not required to stay on the vessel and could have gotten off any time the vessel reached port. He did not do so until required to by his Union (R.T. p. 104, lines 17-21).

Appellant's earnings' record* was as follows:

1960	$1,510.18
1961†	$1,800.05
1962	$2,862.39
1963	$3,333.70
1964	$3,928.63
1965	$3,450.50
1966	$4,444.00

Appellant sought no medical treatment of any kind after 1962 (Appellant's Exhibit 4); as the above earnings record indicates, he worked more after the accident than he did before.

Based on the foregoing, the Court, although concerned about both liability and causation, entered an award in favor of the appellant, but reduced the award 75% for contributory negligence (R.T. pp. 115-118). In arriving at the amount of the judgment, the Court stated:

> "I am going to work with the figures offered me by counsel for the plaintiff, formerly 'proctor' for the libelant. For a number of reasons, if I work with those figures, I think it is not unfair to assess a very, very substantial charge of contributory negligence against the plaintiff (R.T. p. 117, lines 9-14)."

---

*Appellant's Exhibit 7; R.T. p. 47, lines 8-11; R.T. p. 100, lines 21-23.

†The year of the accident.

ARGUMENT

A Judgment Should Not Be Set Aside Unless It Is Clearly Erroneous.

The trial court specifically found that the appellant was 75% contributorily negligent. This finding was made on the basis of uncontroverted and undisputed facts. The burden is on the appellant to show that the findings of the trier of fact are clearly erroneous. *Clinton v. Joshua Hendy Corp.,* 264 F.2d 329 (9th Cir. 1959). In *Kulukundis v. Strand,* 202 F.2d 708, 709-710 (9th Cir. 1953), this Court noted that it is limited in the scope of review "by the general rule, in admiralty proceedings, that the findings are not to be disturbed where they are supported by substantial evidence and are not clearly erroneous." Since there is no question but what the findings are supported by substantial and undisputed evidence, the only question before this Court is whether it wishes to substitute its judgment for that of the trial court with regard to the amount awarded this appellant.

The Trial Court Properly Found Appellant Guilty of Contributory Negligence.

Appellant signed on the *SS Matsonia* on January 28, 1961, and got off April 5, 1961, because his Union limited the sailing time of its members. He claimed that he was bumped repeatedly by various dishrunners and that, as a result of such bumping, he sustained injury to his right knee. Appellant was aware of the continued trauma and the injury. He was also aware that because of the route which the dishrunners took that he would be continually subjected to such trauma unless he did something about it. Nevertheless:

(1) He never requested to be transferred to another job;

(2) He never complained about the "repeated trauma" to his Union delegate;

(3) He never reported the incidents nor made any complaints to any of the ship's officers; and

(4) He did not choose to get off the vessel even though he had complete freedom to do so.

Based on all of these factors, the trial court found appellant contributorily negligent.

Appellant's counsel complains that appellant "was in error when he testified (as he did) that he could have left the vessel 'at any time' " (Br. p. 14). It is then claimed that the Court "must take judicial notice of the fact that when a seaman is aboard a vessel and on articles, he cannot leave the vessel without penalties" (Br. p. 14). What appellant fails to point out is that the *SS Matsonia* made coastwise trips between Los Angeles, San Francisco and Honolulu. Approximately every twenty days the voyage ended and new articles were signed by those seamen who wished to remain aboard. Accordingly, appellant had a number of opportunities to get off the vessel had he desired to do so.

Appellant next complains that he was under no duty to cease working in an area that he knew was causing him repeated injuries. The law is to the contrary. It has been held that where a maritime worker continues to work under conditions known to be dangerous, he may be found contributorily negligent. *Misurella v. Isthmian Lines, Inc.,* 215 F.Supp. 857 (S.D.N.Y. 1964); affirmed 328 F.2d 40 (2nd Cir. 1964). There plaintiff entered a hold knowing it would fill with carbon monoxide fumes from a machine located there. He requested that the blower be put on, but the ventilating system was never put into operation during the episode. Although he was aware of the condition and knew that his fellow employees periodically went up for fresh air, plaintiff worked for one and one-half hours, whereupon he felt nauseous and dizzy and had difficulty breathing. He worked

another hour and finally collapsed from monoxide poisoning. The court held that the defendant was negligent and breached its warranty of seaworthiness in not making a ventilating system available at the proper time. However, the court found the plaintiff contributorily negilgent, stating:

> "It may seem rather odd to hold him liable because he persisted in sticking to his job, but under all the circumstances it was reasonable to require him to forego his task and follow the example of his co-workers. The Court finds that the amount of damages should be reduced to the extent of 50% by reason of plaintiff's contributory negligence." 215 F.Supp. 857 at p. 861.

Likewise, in *Crickett SS Co. v. Parry,* 263 Fed. 523 (2d Cir. 1920); certiorari denied, 252 U.S. 580 (1920), a seaman voluntarily sailed on a vessel he knew to be unseaworthy in that there were dangerous conditions aboard the vessel. The court held that there was no defense of assumption of risk but that the jury was properly charged that the plaintiff could be found contributorily negligent.

Appellant claims that the Court confused assumption of risk with contributory negligence. Assumption of risk was not pleaded nor was it ever injected into the case. What the Court found was that the plaintiff was negligent for three reasons:

> (1) He never reported the incident to anyone;
>
> (2) He never requested to be transferred to another job; and,
>
> (3) He did not get off the vessel although he was free to do so.

Koshorek v. Pacific RR Co., 318 F.2d 364 (3d Cir. 1963), cited by appellant at pages 10 and 11 of his brief, stands merely for the proposition that where a plaintiff worked

under conditions that he knew or should have known, were dangerous, such conduct of the plaintiff might have constituted either contributory negligence or assumption of risk, or both. Therefore, instructions on both doctrines should have been given.

Appellant cites *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424 (1939), as authority for the proposition that assumption of risk has no place in maritime law (Br. pp. 12, 13). What the Court said was that "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine, contributory negligence, however gross, is not a bar to recovery but only mitigates damages." 305 U.S. at p. 431. This rule has been reaffirmed in this Circuit in *Kulukundis v. Strand,* 202 F.2d 708 (9th Cir. 1953).

Appellant cites three cases for the proposition that the fact that he knew of the defective working conditions does not justify a finding of contributory negligence against him. (*Smith v. United States,* 336 F.2d 165 (4th Cir. 1964); *Movible Offshore Co. v. Ousley,* 346 F.2d 870 (5th Cir. 1965); *Hildebrand v. United States,* 134 F.Supp. 514 (S.D. N.Y. 1954) affm'd. 226 F.2d 215 (2d Cir. 1955). A careful reading of each of these cases clearly indicates that they stand for exactly the opposite. In *Hildebrand,* the court found no contributory negligence because the defective rungs on the ladder which were known to plaintiff to be defective did not in any way contribute to the accident. However, the court stated "If libellant's injuries had been occasioned, in some way, . . . (by the defective condition) then the situation would have been quite different" (134 F.Supp. at 518). In *Movible Offshore Co.,* there was a finding that plaintiff's negligence had contributed 30% to his

injury. The court's opinion indicates that such contributory negligence could have resulted from the fact that the plaintiff was aware that the derrick upon which he was working was in some way defective. There is a clear holding in *Smith* that a plaintiff can be held contributorily negligent where he deliberately continues an unsafe course of conduct where he has an alternative that is safe.

Appellee was found negligent, and the vessel was unseaworthy, solely because its officers failed to discover that appellant was being bumped and failed to reroute the scullions working as dishrunners (Finding of Fact 7; C.T. p. 78, lines 19-23). If the liability of the vessel hinged solely upon the fact that the ship's officers did not discover the injury or the "condition," is it unreasonable to hold the appellant who was the only one who had actual knowledge of the injury and the "condition" likewise negligent?

The Court's Finding That Appellant Was Guilty of Contributory Negligence in the Amount of 75% Is Clearly Within the Court's Discretion.

The amount of damages to be awarded a plaintiff in a maritime personal injury suit is basically within the discretion of the trial court. As we have already pointed out above, there was clearly no abuse of discretion in fixing appellant's award here. In *Asaro v. Parisi,* 297 F.2d 859 (1st Cir. 1962), an assessment of 75% contributory negligence was affirmed even though the plaintiff had acted in an emergency which was not created by his own antecedent negligence. See also *Dayton v. Midland SS Lines,* 110 F. Supp. 418 (75% contributory negligence); *Dixon Admx. v. Serodino,* 331 F.2d 668 (6th Cir. 1964) (85% contributory negligence); *Superior Oil Company v. Trahan,* 322 F.2d 234 (1st Cir. 1964) (75% contributory negligence).

CONCLUSION

After careful consideration and a full review of all the circumstances, appellant received an award which, under the circumstances, was most generous. The finding of contributory negligence is supported by the undisputed facts in the record. Accordingly, the District Court's decision should be affirmed.

Respectfully submitted,

Brobeck, Phleger & Harrison
By E. Judge Elderkin
E. Judge Elderkin
Attorneys for Appellee Matson Navigation Company

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

E. Judge Elderkin

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELIJAH DuBOSE, Appellant, vs. MATSON NAVIGATION COMPANY, a corporation, Appellee.	No. 22074

APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS

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APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

The jurisdictional statement, specification of errors relied upon, and statement of the case are to be found in appellant's opening brief dated October 24, 1967.[1/]

ARGUMENT

I

THE TRIAL COURT FOUND THE CRAMPED WORKING CONDITIONS OF THE GALLEY TO BE THE UNSEAWORTHINESS OF THE SS MATSONIA

Appellee, in its brief at page 8, states:

---

1. Appellee does not (and could not) challenge that this Court is in as good a position as the lower Court to evaluate the testimony crucial to this appeal as argued in appellant's opening brief, pages 8-9.

> "Appellee was found negligent, and the vessel was unseaworthy, solely because its officers failed to discover that appellant was being bumped and failed to reroute the scullions working as dishrunners (Finding of Fact 7; C.T. p. 78, lines 19-23)."
> (Emphasis added)

Appellee has, no doubt inadvertently, not stated the full finding of the Court. The Court's judgment rendered upon submission of the case showed:

> "Now, on the question of liability: A narrow passage such as here, whether five feet or four and a half feet wide, probably justifies a finding of unseaworthiness.
>
> "I think it was curable not by reconstructing the entire ship--perhaps that might have cured it--or rearranging that area, but curable by rerouting the dish-runners, or whatever you call them--rerouting the way they go.
>
> "This man had to get the silver cleaned at the place assigned to him. Taking into account the motion of the sea, the confined quarters there and the dimensions of the racks, and so on and so forth, it was almost tailor-made that the racks carried by the dish-runners would bump him, probably on the outside of his right knee, as they were carrying the racks to the galley. It could have been almost a built-in condition for that, it seems to me." (TR 115, L.25 - TR 116, L.14)

The working conditions, and particularly the confined quarters, accounted for the Court's finding of defendant's liability. Mr. DuBose, as the Court pointed out, had to get the silver cleaned under the conditions and at the place assigned to him. Unless he had knowledge

that the working conditions assigned him were dangerous and were causing him serious injury, he cannot be held to be contributorily negligent merely because he remained on the job.

II

APPELLANT WAS UNAWARE THAT THE BUMPINGS WHICH HE CONSIDERED TO BE "LIKE WALKING ALONG AND BUMP YOUR HAND . . . AND YOU JUST IGNORE IT" WOULD LEAD TO SERIOUS INJURY

Appellee, in its brief (page 5) contends that appellant was under a duty "to cease working in an area that he knew was causing him repeated injuries." Whatever the duty may have been if plaintiff knew the bumpings were causing injury, it does not apply in this case because, in fact, the plaintiff did not know he was being injured. A reading of the transcript makes it amply clear that appellant considered the repeated bumpings over a period of time (TR 28, L.4-6) nothing more than mere annoyances, and never considered them to be dangerous or repeated injuries:

> "Q. You never reported any of this incident of bumping or having to work in this space or anything to anyone, did you?
>
> "A. No sir, because I didn't take them to be anything serious." (TR 54, L.22 - TR 55, L.1)
>
> "Q. In fact, that procedure was, whenever any accident actually occurred or any incident

of hard bumps or things like that, you were to report them, weren't you?

"A. Things of that sort, no. You don't report things of that sort because it just like you might be walking along and bump your hand and it might hurt for a minute and you just ignore it." (TR 55, L.8-14)

"Q. Did you realize the seriousness of what was happening when you got these bumps in the back of your leg?

"A. No, I didn't.

"Q. When was it you first realized what was happening, what had happened?

"A. Well, after I had had the operation, then I realized--when I had to have the operation I knew what the doctor told me, it was a minor operation; after I had the operation and I had this trouble and I took this therapy, well, it began to get better, I thought it would improve more." (TR 105, L.6-15)

Appellee cites Misurella v. Isthmian Lines, Inc. (S.D.N.Y., 1964) 215 F.Supp. 857, affirmed (2nd Cir., 1964) 328 F.2d 40. Misurella, a longshoreman, was not only aware that there was no ventilation in the #3 hold in which he was working, but became dizzy as he was working. While his co-workers were getting out of the hold to get fresh air, he remained working, getting dizzier and more ill until he finally collapsed. In contrast, at no time was appellant even aware of the seriousness of the bumpings on the back of his legs. Nor was there any reason for him to anticipate that the repeated bumpings

would ultimately cause him serious injuries. How can the plaintiff be held contributorily negligent for not reacting to an injury he was not aware of?

III

MERE KNOWLEDGE BY APPELLANT OF AN UNSEAWORTHY CONDITION, IN THE ABSENCE OF AN ALTERNATIVE, IS NOT CONTRIBUTORY NEGLIGENCE

The Court below observed: "This man had to get the silver cleaned at the place assigned to him." (TR 116, L.7-8) Appellant had no alternate choice as to where to do his work--he had to work in an area which was cramped and confined.[2/] As the Court said in Smith v. United States (4th Cir., 1964) 336 F.2d 165, at page 168,

> "Had an alternative safe route been available to Smith, his deliberate choice of a course known to be unsafe could possibly have indicated contributory fault. But mere knowledge of the unseaworthy condition and use of the ladder in the absence of a showing that there was an alternative, is not contributory negligence." (Emphasis added)

It is only where the worker has a choice, and chooses carelessly, that he may be found contributorily negligent.

---

2. Appellant, in answer to a question why he made no complaint to the ship's officers, said:

> "Well, because we both had to be working there and we had--I had to stand there and do my work, and they had to be passing by. There was no other way for them to get by to do their work." (TR 31, L.2-5)

are applicable herein. Contrary to appellee's suggestion, the law is clear that a seaman in the performance of his duties is not deemed to assume the risk of unseaworthy appliances, Mahnich v. Southern Steamship Co., 321 U.S. 96 (1944). The U. S. Supreme Court said in Tiller v. Atlantic Coast Line Ry Co., 318 U.S. 54 (1943), at page 58:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment . . ."

Under the F.E.L.A., even though the employee may know that his employer has been negligent in the furnishing of an unsafe place to work, he does not assume the risk of such danger, Williams v. Atlantic Coast Line Ry Co. (5th Cir., 1951) 190 F.2d 744; Heiselmoyer v. Pennsylvania Ry Co. (3rd Cir., 1957) 243 F.2d 773. Seamen and longshoremen do not assume risks which cause injury where the risk is not open and apparent, Klimaszewski v. Pacific Atlantic Steamship Co. (3rd Cir., 1957) 246 F.2d 875, at 877. Appellant DuBose did not assume the risk of his cramped working conditions. Neither can he be charged with contributory negligence for staying on the job, since he reasonably did not know the seriousness or consequences of the repeated bumpings, Kulukundis v. Strand (9th Cir., 1953) 202 F.2d 708.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with these rules.

Dated: December 8, 1967
San Francisco, California

KENNETH W. ROSENTHAL

NO. 22075
NO. 22075A

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DENIS V. DEL GIUDICE,

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vs.

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NO. 22075
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DENIS V. DEL GIUDICE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

STATEMENT OF JURISDICTION

Appellant filed a timely [1/] appeal from judgments of conviction for violation of the Drug Abuse Control Amendments of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 331 (q)(2) and (3) and

---

1/ A 4-count Indictment charged appellant with violation of 21 U.S.C. 331 (q)(2), 331 (q)(3), and 331 (p). [No. 22075, pp. 2-4]. On April 17, 1967, appellant pled guilty as to Count 3 of this Indictment and on the same day the District Court entered its Judgment and Probationary Order [No. 22075, pp. 6-7].

A 2-count Indictment charged appellant with additional violations of 21 U.S.C. 331 (q)(2) and (3) [22075 A, pp. 2-3]. On April 17, 1967, appellant pled guilty as to Count 1 of this Indictment and on the same day the District Court entered its Judgment and Probationary Order [No. 22075 A, pp. 4-5].

On April 24, 1967, appellant filed a Notice of Appeal from each Judgment [No. 22075, p. 8; No. 22075 A, p. 6].

21 U.S.C. 333 (a).

Pursuant to 18 U.S.C. 3231, the District Court had jurisdiction to try these cases.

Under 28 U.S.C. 1291 and 1294, this Court has jurisdiction to review the judgments of the District Court.

STATEMENT OF THE CASE

The Indictments in this appeal charged appellant Del Giudice with the sale, delivery and possession for sale of the hallucinogenic drug LSD in violation of the Federal Food, Drug and Cosmetic Act, as amended.

On April 17, 1967, the District Court denied appellant's motions to dismiss the Indictments on grounds of alleged unconstitutionality of the statute [No. 22075, pp. 6 and 9; No. 22075 A, pp. 4 and 7]. Thereupon, appellant pled guilty to one count of each indictment, reserving the right to challenge the constitutionality of the statute on appeal [2] [No. 22075, pp. 6 and 10; No. 22075 A, pp. 4 and 8].

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2 It appears settled that guilty and nolo pleas "may be reviewed to determine whether a crime is stated by the indictment". United Brotherhood of Carpenters v. United States, 330 U.S. 395, 412, footnote 26 (1947); Jaben v. United States, 333 F.2d 535, 538 (C.A. 8, 1964), aff'd. 381 U.S. 214 (1965); United States v. Bradford, 160 F.2d 729, 730 (C.A. 2, 1947), cert. denied 331 U.S. 829; Oesting v. United States, 234 Fed. 304, 306 (C.A. 9, 1916); Universal Milk Bottle Service v. United States, 188 F.2d 959, 961-2 (C.A. 6, 1951).

On April 17, 1967, the District Court entered a judgment of conviction in each case, suspended imposition of sentence and placed appellant on probation for a period of two years, the two probationary periods to run concurrently [No. 22075, p. 7; No. 22075 A, p. 5]. On April 24, 1967, appellant filed a Notice of Appeal in each case [No. 22075, p. 8; No. 22075 A, p. 6].

RELEVANT STATUTES AND REGULATIONS

21 U.S.C. 333 Penalties - Violation of Section 331 of this title

(a) Any person who violates any of the provisions of Section 331 of this title shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine . . .

21 U.S.C. 331 Prohibited acts

The following acts and the causing thereof are hereby prohibited:

* * *

(q) . . . (2) the sale, delivery, or other disposition of a drug in violation of Section 360a(b) of this title; (3) the possession of a drug in violation of Section 360a(c) of this title; . . . .

21 U.S.C. 360a Depressant and stimulant drugs . . .

* * *

Sale, delivery, and disposal; persons exempt from prohibition

(b) No person . . . shall sell, deliver, or otherwise dispose of any depressant or stimulant drug to any other person.

Possession restriction; burden of proof in criminal prosecutions

(c) No person . . . shall possess any depressant or stimulant drug otherwise than (1) for the personal use of himself or of a member of his household, or (2) for administration to an animal owned by him or a member of his household. In any criminal prosecution for possession of a depressant or stimulant drug in violation of this subsection (which is made a prohibited act by Section 331(q)(3) of this title), the United States shall have the burden of proof that the possession involved does not come within the exceptions contained in clauses (1) and (2) of the preceding sentence.

21 U.S.C. 321 Definitions; generally

For the purposes of this chapter --

* * *

(v) The term "depressant or stimulant drug" means -

(1) any drug which contains any quantity of (A) barbituric acid or any of the salts of barbituric

acid; or (B) any derivative of barbituric acid which has been designated by the Secretary under Section 352(d) of this title as habit forming;

(2) any drug which contains any quantity of (A) amphetamine or any of its optical isomers; (B) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (C) any substance which the Secretary, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; or

(3) any drug which contains any quantity of a substance which the Secretary, after investigation, has found to have, and by regulation designates as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect; except that the Secretary shall not designate under this paragraph, or under clause (C) of subparagraph (2), any substance that is now included, or is hereafter included, within the classifications stated in Section 4731, and marihuana as defined in Section 4761 of Title 26.

The provisions of subsections (e), (f), and (g) of Section 371 of this title shall apply to and govern proceedings for the issuance, amendment, or repeal of regulations under subparagraph (2) (C) or (3) of this paragraph.

CONSTITUTION OF THE UNITED STATES

Article 1, Section 8

The Congress shall have power:

* * *

(3) To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

* * *

(18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers. . . .

REGULATIONS

21 C.F.R. 166.3 Listing of drugs defined in Section 201(v) of the Act [21 U.S.C. 321(v)]:

* * *

(c) The Commissioner has investigated and designates all drugs, unless exempted by regulations in this part, containing any amount of the following substances as having a potential for abuse because of their:

* * *

(3) Hallucinogenic effect:

Established name	Some trade and other names
DMT	Dimethyltryptamine
LSD-25; LSD	d-Lysergic acid diethyiamide.

Mescaline and its salts.

Peyote ----------

Psilocybin; psilocibin ----

Psilocyn; Psilocin -------

The listing of peyote in this subparagraph does not apply to non-drug use in bona fide religious ceremonies of the Native American Church; however, persons supplying the product to the Church are required to register and maintain appropriate records of receipts and disbursements of the article.

ARGUMENT

A. THE FEDERAL FOOD, DRUG, AND COSMETIC ACT HAS BEEN REVISED FREQUENTLY TO ENHANCE ITS EFFECTIVENESS AS AN INSTRUMENT OF PUBLIC PROTECTION.

The Federal Food, Drug, and Cosmetic Act was enacted in 1938 as a comprehensive statute to safeguard the public from food, drugs, devices, and cosmetics that are adulterated, misbranded, or otherwise pose a threat to the consumer. United States v. Dotterweich, 320 U.S. 277, 280 (1943); United States v. Sullivan,

332 U.S. 689, 696 (1948); United States v. Walsh, 331 U.S. 432, 437 (1947); United States v. El-O-Pathic Pharmacy, 192 F.2d 62, 74-75 (C.A. 9, 1951); Drown v. United States, 198 F.2d 999, 1004 (C.A. 9, 1952), cert. denied 344 U.S. 920; Golden Grain Macaroni Co. v. United States, 209 F.2d 166, 168 (C.A. 9, 1953).

Since 1938, Congress has enacted a number of amendments to this law, fashioned to cope with special problems as they have arisen and become acute beyond the effective reach of the basic statute. Some examples of problems requiring amendatory legislation are excessive residues of pesticide chemicals on foods, United States v. Bodine Produce Co., Inc., 206 F. Supp. 201, 206-207 (D. Arizona, 1962), and the premature marketing of "new drugs" without adequate testing for safety and effectiveness, Turkel v. Food and Drug Administration, 334 F.2d 844, 845 (C.A. 6, 1964), cert. denied 379 U.S. 990. The amendments devised new types of controls as needed to deal with the problem at hand.

The present case arose under the Drug Abuse Control Amendments of 1965 (79 Stat. 226-236). These amendments are concerned with a limited class of drugs as defined in 21 U.S.C. 321(v), namely, drugs which (1) are dangerous and lend themselves to widespread and serious misuse throughout the nation, (2) flow freely through, pollute, and otherwise affect, the channels of interstate commerce, and (3) are distributed surreptitiously without labels or other characteristics that would identify their manufacturing source so that there is a commingling of drugs of interstate and intrastate origin, thereby frustrating the Congressional purpose to regulate interstate

traffic in such drugs.

A prior amendment enacted in 1951 (68 Stat. 648 ff) to deal with dangerous drugs had focused primarily upon unsavory dispensing practices of some pharmacists, United States v. Carlisle, 234 F.2d 196 (C.A. 5, 1956), cert. denied 352 U.S. 841, but had shown itself to be cumbersome and unwieldy in the face of widespread clandestine distribution of tremendous quantities of dangerous drugs outside the drugstore. De Freese v. United States, 270 F.2d 730, 731-2, 735-8 (C.A. 5, 1959), cert. denied 362 U.S. 944; Roseman and Copley v. United States, 364 F.2d 18, 20-24 (C.A. 9, 1966), cert. denied 386 U.S. 918.

The Roseman and Copley case, supra, decided by this Court, arose under the pre-existing statute and illustrates well some of the compelling reasons for enactment of the Drug Abuse Control Amendments. The drug in question was LSD as in the present case. It was sold in liquid form and as the Court observed at page 21:

> "When it was delivered to Pilson it did not have any label on it nor any warnings as to use, any common name, any statement of the ingredients or composition, nor any of the other markings required by the Federal Food, Drug, and Cosmetic Act. . . ."

In fact, as pointed out by the Court on page 20, there was no dispute that the defendants had sold LSD which would be in violation of the statute if it could be shown that the drug had been introduced into interstate channels.

The principal defense in Roseman was that the LSD was

made in California and had never left the state. The protracted trial revolved largely around this one issue. Defendants were convicted and the conviction sustained because evidence was adduced showing that the defendants had made their way through California to Canada and back to California with concentrated LSD in their possession, offering it for sale as they went up and down the coast, and organizing an LSD party in Canada where one participant was injured. This evidence was sufficient to meet the requirements of interstate commerce under the basic statute (page 20). After conducting the prolonged trial in Roseman and observing the great expense and difficulty entailed in establishing movement of an unlabeled dangerous drug in interstate commerce, Chief Judge Harris felt obliged to state: 3/

> " . . . I think there is a very grave responsibility upon the part of the Food and Drug authorities to make appropriate recommendations to such congressional committees as may be involved with respect to appropriate legislation in connection with this type of drug as in connection with kindred types of drugs."

Unquestionably, Judge Harris was concerned about the inadequacy of the basic statute to control effectively the growing menace of

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3/ (C.A. 9, No. 19636, V. 9, pp. 1100-1101). We believe the Court may take judicial notice of its own records in another case. See United States v. Pink, 315 U.S. 203, 216 (1942); National Fire Insurance Co. v. Thompson, 281 U.S. 331, 336 (1930); Wiley v. United States, 144 F.2d 707, 708 (C.A. 9, 1944).

LSD and similar dangerous drugs. On January 27, 1965, the Commissioner of Food and Drugs transmitted the views of Judge Harris to a Congressional committee that was deeply immersed in this problem (Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 89th Cong., 1st Sess. on H.R. 2), stating in part on page 23:

> "In sentencing the defendants, Judge Harris remarked that the Food and Drug authorities should recommend legislation appropriate to deal with these types of drugs to interested congressional committees."

Six months later, the Drug Abuse Control Amendments were enacted.

B. THE PATTERN AND SCOPE OF THE DRUG ABUSE CONTROL AMENDMENTS OF 1965.

For a decade and a half, 1950-1965, Congressional committees inquired into the expanding nationwide problem of drug abuse and the inadequacy of the then existing laws to control it. The Drug Abuse Control Amendments of 1965 are the end result of that study. Some of the Congressional findings are summarized in Senate Report No. 337 published in United States Code Congressional and Administrative News, 1965, pages 1895-1909. For example, at page 1896 the Report states:

> "At the hearings last year, testimony showed that over nine billion barbiturate and amphetamine tablets are produced annually in the United States.

It is estimated that over 50 percent, or 4 1/2 billion tablets, are distributed through illicit channels.

"The human toll of drug abuse cannot be measured for it affects not only the abuser but his family and the community around him. Drug abuse is closely bound up with juvenile delinquency. It also contributes to the rising crime rate in the United States. Misuse of these drugs has contributed to the rising accidents on the highways.

"The illegal traffic in drugs is enormously profitable. Barbiturates and amphetamines having a retail value of approximately $670 sell in illicit channels for in excess of $250,000."

Specifically with respect to LSD, the Report states at page 1898:

"Hallucinogens are drugs which affect the central nervous system in such a fashion as to cause the user to have a distorted sense of reality. The most prominent of the hallucinogenic drugs being abused today is d-lysergic acid diethylamide, more commonly referred to as LSD-25. This drug is sometimes used as an adjunct to psychotherapy and as a research tool in psychiatry. Its use by amateurs and drug abusers can cause some terrifying experiences for the victims. It is capable of producing prolonged psychiatric reactions in persons possessing a previous underlying personality problem, and can precipitate

the acting out of anti-social-behavior patterns."

On page 1896, the Report declares the purpose of this legislation:

> "The bill provides increased controls over the distribution of barbiturates, amphetamines, and other drugs having a similar effect on the central nervous system. The controls are accomplished through increased recordkeeping and inspection requirements, through providing for control over intrastate traffic in these drugs because of its effect on interstate traffic, and through making possession of these drugs (other than by the user) illegal outside of the legitimate channels of commerce."

The term "depressant or stimulant drug" is defined to include amphetamines and barbiturates, and, through implementing regulations, such drugs as LSD. [21 U.S.C. 321(v)(1) - (3); 21 C.F.R. 166.3(c)(3)]. The sale, delivery, and possession of these drugs (other than for personal use) is prohibited. [21 U.S.C. 360a(b) and (c); 21 U.S.C. 331(q)(2) and (3)]. Exceptions are made where the drugs are legitimate articles of commerce or research 4/ and are

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4/ LSD is a "new drug" which may not be distributed commercially until a New Drug Application establishing its safety and effectiveness has been approved by the Food and Drug Administration. [21 U.S.C. 355(a); 21 U.S.C. 360a(b)]. There is no approved NDA for LSD. See Roseman and Copley v. United States, 364 F.2d 18, 20 and 24 (C.A. 9, 1966), cert. denied 386 U.S. 918. (Continued)

confined to the legtimate chain of distribution. [21 U.S.C. 360a(a) - (c)]. All persons (with minor exceptions) who make, sell, or otherwise dispose of any such drugs are required to maintain detailed inventories and records accounting for all quantities that pass through their hands, and failure to comply with these requirements is an offense. [21 U.S.C. 360a(d) - (f); 21 U.S.C. 331(q)(4) and 333(a)].

In addition to the data uncovered by its own inquiries, Congress relied heavily upon the authoritative Final Report dated November 1, 1963, of the President's Advisory Commission on Narcotic and Drug Abuse; the Chairman of this Commission was Judge E. Barrett Prettyman, retired Chief Judge, U. S. Court of Appeals, Washington, D.C. [Senate Report No. 337, United States Code Congressional and Administrative News, 1965, pages 1896-1897 and 1899]. On page 1 of the Introduction to the Final Report, the Commission stated in part:

> "What are these drugs that can turn potentially useful citizens into hopeless, estranged, dependent individuals? That can turn normal young men and women to crime? . . . They include cocaine, marihuana, LSD 25, mescaline, the barbiturates, the

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4/ (Continued) A "new drug" for which there is no approved NDA may be distributed for investigational use under strict controls. [21 U.S.C. 355(i); 21 C.F.R. 130.3]. Especially tight controls have been established to govern any research in LSD, requiring advance approval of the Commissioner of Food and Drugs because of the great hazards involved. [21 C.F.R. 3.47; see also preamble to this regulation in 31 F.R. 9540].

amphetamines, ether, airplane glue and even certain of the so-called 'tranquillizers'. All profoundly affect the central nervous system and mind. The effects produced by taking these drugs are primarily on the brain and range from euphoria through excitement to depression. Some produce hallucinations. Many bring about a deep feeling that everything in life must be made to serve the purpose of maintaining a supply of the drug. These drugs are psychotoxic (mind poisoning). A psychotoxic drug is any chemical substance capable of adducing mental effects which lead to abnormal behavior. They affect or alter to a substantive extent, consciousness, the ability to think, critical judgment, motivation, psycho-motor coordination or sensory perception. Most of the psychotoxic drugs have a legitimate medical use. . . . Abuse occurs when these drugs are used for their psychotoxic effects alone and not as therapeutic media prescribed in the course of medical treatment."

In discussing The Harrison Act of 1914, the Final Report of the Commission stated on page 31:

"This method of regulation by taxation, which resulted in the vesting of narcotics control in the Department of the Treasury, can only be understood in its historical setting. When the Harrison Act was drafted, Congress was concerned

about its constitutionality. The landmark cases establishing the full sweep of federal regulatory power under the commerce clause of the Constitution were yet to come." [Emphasis added].

On pages 43-44 of the Final Report, the Commission emphasized the need for federal regulation of all non-narcotic drugs capable of producing serious psychotoxic effects:

"The manufacture, sale, and distribution of dangerous drugs is a national business, conducted across states lines, and the interstate character of the traffic, both licit and illicit, limits the ability of any single state to cope with its individual problem.

* * *

"The Commission makes several specific observations concerning any new legislation providing for federal regulation of the manufacture, sale, and distribution of dangerous drugs:

"1. Legislation should not be limited to the barbiturates and amphetamines, but should extend to all non-narcotic drugs capable of producing serious psychotoxic and antisocial effects when abused. Experience has proved that the drug abuser often turns to other drugs having similar effects when barbiturates or amphetamines become difficult to obtain." [Emphasis added].

In its Conclusion, the Commission stated on page 75:

> "The Commission is mindful that control of the drug abuse problem is a most difficult matter. The smugglers and illicit traffickers are clever and ruthless. . . . Federal action alone cannot do the job. State and local governments, private organizations, and the community at large must bring their full resources to bear on the problem. <u>But the federal government has a crucial contribution to make.</u>" [Emphasis added].

As the result of its extensive investigations into the drug abuse problem, Congress concluded that, to regulate interstate traffic in these drugs, it was essential to control closely related intrastate activities. The reasons for this conclusion are set forth in Congressional Findings and Declaration of Policy which appear as Section 2 of the Amendments, Public Law 89-74, 79 Stat. 226. These Findings and Declaration are also quoted in 21 U.S.C.A. in the Notes following Section 360a, page 121 of the 1966 Cumulative Annual Pocket Part:

> "The Congress hereby finds and declares that there is a widespread illicit traffic in depressant and simulant drugs moving in or otherwise affecting interstate commerce; that the use of such drugs, when not under the supervision of a licensed practitioner, often endangers safety on the highways (without distinction

of interstate and intrastate traffic thereon) and otherwise has become a threat to the public health and safety, making additional regulation of such drugs necessary regardless of the intrastate or interstate origin of such drugs; that in order to make regulation and protection of interstate commerce in such drugs effective regulation of intrastate commerce is also necessary because, among other things, such drugs, when held for illicit sale, often do not bear labeling showing their place of origin and because in the form in which they are so held or in which they are consumed a determination of their place of origin is often extremely difficult or impossible; and that regulation of interstate commerce without the regulation of intrastate commerce in such drugs, as provided in this Act, would discriminate against and adversely affect interstate commerce in such drugs."

As enacted, the Drug Abuse Control Amendments do not require the Government to prove that the "depressant or stimulant drug" involved in a particular forbidden transaction 5/ had previously been transported from another State or a foreign country. This is the basis for appellant's argument that the statute as

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5/ Such drug is subject to seizure and condemnation. [21 U. S. C. 334(a)(2)]. Persons responsible for the doing of prohibited acts with respect to such drug are subject to injunction and criminal action. [21 U. S. C. 331(q), 332(a), and 333(a)].

amended is unconstitutional.

C. THE DRUG ABUSE CONTROL AMENDMENTS ARE CLEARLY WITHIN THE CONSTITUTIONAL POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE.

Appellant attacks the constitutionality of important amendments to the Federal Food, Drug, and Cosmetic Act, without citing the long line of Supreme Court cases that have a direct bearing on this issue. These cases sustain the power of Congress to regulate local activities which substantially affect its plenary control over interstate commerce:

Heart of Atlantic Motel, Inc. v. United States,
379 U.S. 241, 251-258 (1964);

Katzenbach v. McClung,
379 U.S. 294, 299-304 (1964);

Wickard v. Filburn,
317 U.S. 111, 118-128 (1942);

Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 772 (1947);

United States v. Haley,
358 U.S. 644 (1958), reversing
166 F. Supp. 336;

United States v. Wrightwood Dairy Co.,
315 U.S. 110, 119-121 (1942);

United States v. Darby,

312 U.S. 100, 119-121 (1941);

United States v. New York Central Railroad Co.,

272 U.S. 457, 464 (1926);

NLRB v. Reliance Fuel Oil Corp.,

371 U.S. 224, 226 (1963).

Thus in United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942), the Court upheld the validity of a Federal regulation controlling the price of milk produced and sold intrastate. On page 119, the Court stated:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. ... The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. ... It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a

substantial way interfere with or obstruct the exercise of the granted power." [Emphasis added].

See also Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 772 (1947).

In Wickard v. Filburn, 317 U.S. 111 (1942), the Court considered the constitutionality of the Agricultural Adjustment Act under the Commerce Clause where the statute "extend[ed] federal regulation to production not intended in any part for commerce but wholly for consumption on the farm" (page 118). In its review of the significant cases up to that time, delineating the "great latitude" of the commerce power (page 120), the Court included a quotation from an opinion of Mr. Justice Holmes (page 122):

> " . . . 'commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.' " 6/

After declaring that "the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation" (page 122), and citing a number of examples, the Court sustained the validity of the statute in these words (pages 128-9):

6/ In a later case defining the broad reach of the control of false labeling under the Federal Food, Drug, and Cosmetic Act, the Court again relied upon this concept:

> "The Act is not concerned with the purification of the stream of commerce in the abstract. The problem is a practical one of consumer protection, not dialectics."

United States v. Urbuteit, 355 U.S. 355, 357-8 (1948).

" . . . Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."

In United States v. Darby, 312 U.S. 100 (1941), the Court referred to a line of cases upholding the Congressional power where local and interstate activities are interwoven and difficult to identify and separate. On page 121, the Court said:

"A familiar . . . exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. . . . Similarly Congress may require inspection and preventive treatment of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle without the treatment. Thornton v. U.S., 271 U.S. 414." [Emphasis added].

These observations are particularly appropriate with respect to drugs dealt with by the Drug Abuse Control Amendments, since they command high profits in illicit channels and move throughout the nation with great mobility but without a label stating where they were made, so that interstate and intrastate dealings in these drugs are inseparably intertwined. See also United States v. New York

Central Railroad Co., 272 U.S. 457, 464 (1926).

Nor is it relevant whether a particular local transaction is large or small. In NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963), the Court observed at page 226:

> "Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."

See also Wickard v. Filburn, 317 U.S. 111, 127-128 (1942).

Finally, in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), where the Court upheld Title II of the Civil Rights Act of 1964, it stated at page 258:

> "It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, 'if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' . . ."

This is, of course, a landmark case in defining the breadth of the power of Congress to regulate, and protect its regulation of, interstate commerce. See pages 253-259 of the opinion.

The principles enunciated in the cases cited above have been applied to sustain the constitutionality of other provisions of the

Federal Food, Drug, and Cosmetic Act which regulate intrastate activities. Thus, it is within the constitutional power of Congress under the "Commerce Clause" to prohibit the giving of a false guaranty of assurance (to a person engaged wholly or partly in an interstate business) that a vitamin product is not adulterated or misbranded within the meaning of the Act, regardless of whether that guaranty leads in any particular instance to an illegal shipment in interstate commerce. 7/ United States v. Walsh, 331 U.S. 432, 437-438 (1947).

Congress may also regulate the dispensing practices of a retail druggist in a purely intrastate transaction with respect to a drug that had previously been shipped in interstate commerce. United States v. Sullivan, 332 U.S. 689, 691-2, 696-8 (1948).

Similarly, Congress may prohibit the holding of food (after interstate shipment and before ultimate sale) under insanitary conditions whereby it may become contaminated with filth. United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91-2 (1964).

Congress may further prohibit the intrastate sale and delivery of a misbranded device where the seller knows that the buyer intends to take the device to another State. Drown v. United States, 198 F.2d 999, 1004 (C.A. 9, 1952), cert. denied 344 U.S. 920.

In each of these cases, it was clear there was a rational

7/ 21 U.S.C. 331(h). Compare with erroneous statement on pages 10 and 11 of appellant's brief: "Every section in the comprehensive Federal Food and Drug Act hitherto has required that the drug sought to be controlled must have travelled in interstate commerce."

basis to conclude that regulation of the particular intrastate activity was "necessary and proper" to prevent obstruction or thwarting or nullification of the Congressional exercise of constitutional power over interstate commerce. In like manner, the Drug Abuse Control Amendments regulate "intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power". United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942).

Through more conventional legislation, Congress has sought to control interstate traffic (1) in "dangerous drugs" that are suitable for bona fide prescription sale [21 U.S.C. 353(b)(1)], and (2) in unproven "new drugs" which include certain of the dangerous drugs such as LSD that are not yet suitable for prescription sale [21 U.S.C. 355 and 321(p)]. Such legislation is ineffective to deal with the vast quantities of "depressant and stimulant" drugs [21 U.S.C. 321(v)] that move through the channels of interstate commerce in a clandestine manner, because they carry no indicia of interstate origin so that it is "often extremely difficult or impossible" to establish the element of interstate commerce or of smuggling. [Congressional Findings and Declaration of Policy, quoted supra in Part B of this argument; see also Roseman and Copley v. United States, 364 F.2d 18, 21 (C.A. 9, 1966), cert. denied 386 U.S. 918]. Congress has found in addition that misuse of these drugs often endangers safety on the highways, without distinction as to interstate and intrastate traffic thereon.

As a last resort, and to prevent frustration of its constitutional power, Congress enacted the Drug Abuse Control

Amendments as the only effective way to regulate interstate commerce in drugs of this type which are characterized by an indistinguishable blending of interstate and intrastate activities. Clearly, this is a valid exercise of Congressional power, wholly consonant with the great judicial rulings in constitutional law, and the "necessary and proper" grant in Article 1, Section 8, of the Constitution. See Katzenbach v. McClung, 379 U.S. 294, 301-2 (1964).

The record keeping requirement throughout the chain of distribution of "depressant or stimulant" drugs was also an important factor in the legislative decision to regulate both intrastate and interstate activities in these drugs. [21 U.S.C. 360a(d) - (f) and 331(q)(4)]. Record keeping was deemed essential because vast quantities of these drugs were being diverted to illicit and non-medical usage. Such diversions would be difficult to conceal under the record audits prescribed by the statute. Yet the required record keeping imposes a task which many would shun if they could. How better could one avoid this record keeping for illicit purposes and defeat the statutory objective than by asserting that the drugs came from a local source? In addition, legitimate interstate commerce in "depressant or stimulant" drugs would be adversely affected by the failure to regulate intrastate commerce in such drugs since legitimate wholesalers and distributors would have a bookkeeping incentive to purchase drugs of local origin if such are available, and discriminate against drugs of interstate origin.

With respect to "new drugs" such as LSD whose safety and

effectiveness have not yet been established [21 U.S.C. 321(p)(1)], it is the policy of Congress to encourage their nationwide distribution for legitimate investigational use under appropriate safeguards so as to make valuable drugs available to the public as soon as their usefulness and safety are proven. [21 U.S.C. 355(i); 21 C.F.R. 130.3; Turkel v. Food and Drug Administration, 334 F.2d 844, 845 (C.A. 6, 1964), cert. denied 379 U.S. 990]. Black market distribution of a drug like LSD for kicks instead of controlled research, with bizarre and tragic results as well as unfavorable notoriety, interferes with the orderly investigation, development, and marketing of a drug which has a potential for good as well as harm. There is a disinclination on the part of the bona fide researcher to become involved with a drug which has a sordid reputation. There is a similar reluctance by the manufacturer to make an investment in a stigmatized drug for bona fide research. The Swiss firm that developed LSD and sponsored its investigational use in this country since 1953, discontinued its sponsorship in 1966; the only legitimate supplier of LSD for research in the United States is a Government agency, the National Institute of Mental Health. [Testimony of the Commissioner of Food and Drugs in Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives, 89th Cong., 2d Sess., June 7, 1966, pages 2133-2136].

Thus the clandestine traffic in LSD, whether local or interstate, adversely affects a vitally important type of interstate commerce in the drug -- namely, interstate distribution for genuine

investigational use. Regulation of intrastate commerce as well as interstate commerce in such drugs is essential to prevent or minimize these adverse effects.

Much of appellant's brief consists of a discussion of cases dealing with narcotics. But those cases are not relevant here since Congress chose a different regulatory pattern in enacting the Drug Abuse Control Amendments. The narcotic laws create rebuttable presumptions regarding interstate commerce. The Amendments in question rest upon a different basis since they dispense with any showing of interstate commerce in an individual case involving a "depressant or stimulant" drug.

Appellant's brief suggests that these Amendments are an initial step toward Federal preemption (page 15). This is entirely incorrect. Section 10 of the Amendments unequivocally declares a Congressional intent to the contrary:

> "(b) No provision of this Act nor any amendment made by it shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision or amendment operates to the exclusion of any State law on the same subject matter, unless there is a direct and positive conflict between such provision or amendment and such State law so that the two cannot be reconciled or consistently stand together.
>
> "(c) No amendment made by this Act shall be construed to prevent the enforcement in the Courts

of any State of any statute of such State prescribing any criminal penalty for any act made criminal by any such amendment."

[Quoted in 21 U. S. C. A. in the Notes following Section 321, page 73, of the 1966 Cumulative Annual Pocket Part].

Congress in fact contemplated that the States would have an increasing role in the control of this problem. See Senate Report 337, U. S. Code Congressional and Administrative News, 1965, page 1904.

Appellant's brief (page 6) erroneously suggests that any high school chemistry student and any "half-baked" chemist can make LSD, and that this is conceded by Government officials. This very point was raised in a Congressional hearing on June 7, 1966. We quote from the pertinent colloquy involving Congresswoman Dwyer, Dr. Goddard (Commissioner of Food and Drugs), and Dr. Banes (Deputy Director, Bureau of Scientific Research):

"MRS. DWYER. Mr. Chairman, may I ask Dr. Goddard a question. Should the components of LSD be regulated by law?

"DR. GODDARD. Of course, Mrs. Dwyer, as you will recall, we have proposed for control, lysergic acid, which is one of the immediate precursors because we felt that in some instances, this was being obtained and being used to synthesize LSD-25, and so that step has been taken. So as we identify these precursors, we can attempt to bring

them under control, too.

"MRS. DWYER. Is it true that LSD can be made very simply, if you get the components, by a high school student or college student or are many of these reports in the press exaggerated?

"DR. GODDARD. Our chemists have made this in our own laboratories and I have with us Dr. Banes who may wish to comment on that, but it is my understanding that a reasonably competent chemistry major in college could take one of the precursors and in 4 to 5 hours, produce a quantity of LSD sufficient for a number of trips. Of course it would depend on the quantities he started with. Dr. Banes.

DR. BANES. I can expound on that but slightly. I think Dr. Goddard has given the essential facts. The conversion of lysergic acid to LSD can be performed by a competent chemist, providing he has the facilities and the materials. It is not a bathtub procedure. You and I couldn't perform it without the proper facilities, and high school students probably would not have the proficiency nor access to the materials to perform it. But college students, especially in advanced departments in universities, undoubtedly could perform the process and come up with a potent product." [Emphasis added].

[Hearings before a Subcommittee of the Committee on Government

Operations, House of Representatives, 89th Cong., 2d Sess., pages 2180 and 2124.]

We believe it appropriate to call to the Court's attention the case of Deyo v. United States (C. A. 9, No. 22058). The Deyo case presents essentially the same question as the instant case with respect to the constitutionality of the Drug Abuse Control Amendments. Argument in the Deyo appeal is now set for January 17, 1968, and we will at that time advise the Court of the pendency of this case.

CONCLUSION

We submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gabriel A. Gutierrez
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No. 22,078

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

NOEL HUNT McROBERTS, ET AL.,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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JURISDICTIONAL STATEMENT

The appellees brought this action against the United States in the United States District Court for the Central District of California. Their complaint filed under the Federal Tort Claims Act, alleged that they had suffered damages as the result of the negligent driving of a serviceman, who was then on leave and operating his personally-owned automobile while enroute to his home for a six week vacation. Notwithstanding the use of his personal vehicle for personal purposes, the district court, after a separate trial limited to that issue, ruled that the serviceman was acting within the scope of his employment for the United States Government. (R. 26).

Subsequently, the United States, while reserving its righ to appeal to this Court on the scope of employment issue, with drew its contention that the serviceman was not negligent. The court below accordingly entered a judgment totaling $69,70 in favor of the appellees. (R. 30). The United States then noted this appeal. The jurisdiction of this Court is based upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is an action for damages brought under the Federal Tort Claims Act resulting from an automobile collision on November 20, 1963, in which appellee Noel Hunt McRoberts was injured and in which his wife and his mother-in-law were killed. It is conceded that this collision, which occurred between the McRoberts' car and a car driven by Ray Allen Gorham, not a party to this action, was caused by the negligent passing maneuver of a third car driven by the serviceman, Aaron G. Bryant.

Bryant was an airman second class in the United States Air Force at the time of the accident. He had been permanently stationed with the 86th Air Transport Squadron at Travis Air Force Base, California for approximately one year. On November 4 and 5, 1963, Bryant received orders, permanently relieving him of his assignment at Travis Air Force Base and permanently transferring him, effective March 14, 1964, to the 315th Troop Carrier Group, Pacific Air Force, APO San Francisco. With respect to the intervening period, i.e. up to March 14, 1964, the orders provided as follows:

1. Vacation or Leave Time. Bryant was authorized to leave Travis Air Force Base on November 18, 1963, so that he could take 45 days of leave or vacation time before reporting at Pope Air Force Base in North Carolina on January 20, 1964. Bryant was authorized, but not required, to use a privately owned car, and if such transportation was used Bryant was allowed 12 additional days travel time between Travis Air Force Base and Pope Air Force Base.[1/]

2. Training School at Fort Pope. Between January 20, 1964, and February 26, 1964, Bryant was ordered to attend a 37 day Crew Training Course in C-123 Aircraft at Pope Air Force Base, North Carolina. This temporary assignment was evidently to prepare Bryant for his new permanent duty assignment.

3. Additional Temporary Duty. Finally, while enroute from Pope Air Force Base to his new assignment at the 315th Troop Carrier Group, Pacific Air Force, Bryant was authorized three days of temporary duty at the 405th Fighter Wing, Pacific Air Force, APO San Francisco.

Because of the accident the last two phases of Bryant's orders were never completed. It also is appropriate to note

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1/ The orders specified 26 days of actual travel time (R. 21) but this included a return drive to the west coast. The official authorized travel time from Travis Air Force Base, California, to Pope Air Force Base, North Carolina was 12 days. (R. 23).

here that Bryant could have left Travis Air Force Base by car as late as January 8, 1964, in order to arrive at Pope Air Force Base by January 20, 1964. However, taking full advantage of the vacation or leave granted to him for his personal use and convenience, Bryant chose to leave Travis Air Force Base immediately after completion of his base clearance in order to spend the Thanksgiving and Christmas holidays with his family at home in East Orange, New Jersey. Thus, on November 19, 1963, Bryant departed for home from Travis Air Force Base in his recently acquired privately owned car, taking with him several flying suits, his helmet and oxygen masks, and various tools issued him at Travis Air Force Base to be used during his flight training at Pope Air Force Base. (Tr. 46-47). Bryant's orders provided for shipping these items to Pope Air Force Base in the event he chose to travel by common carrier, e.g. plane or train or bus, rather than by private car. (R. 21). He was, of course, free to use any of these means of transportation.

On November 19, 1963, Bryant was given advance travel pay in the amount of $290.30 figured at the rate of six cents per mile for the official distance and to cover transportation, meals and lodging. (R. 23). On November 20, 1963, at approximately 10:00 a.m., he was driving east on Route 66 in San Bernardino County, California, when the accident occurred. Route 66 is the direct route to the east coast regardless of whether the ultimate destination is New Jersey or North Carolina.

The accident occurred when Bryant, accompanied by two hitch-hikers he had picked up, attempted to pass the two vehicles immediately in front of him. He pulled his car into the westbound lane to pass these vehicles when he first saw the car, driven by Ray Allen Gorham, approaching him in the westbound lane. Bryant pulled onto the lefthand shoulder but Gorham, in order to avoid hitting Bryant, swerved into the eastbound lane and hit the McRoberts car head-on.

On November 23, 1963, Bryant returned to Travis Air Force Base. His orders were cancelled shortly thereafter. (R. 22). He was charged with leave time for the time he had been away from the Base. (R. 22-23). Additionally, since Bryant had been on leave time, he was not reimbursed by the Air Force for the distance actually traveled and he was required to repay the lump sum advanced for travel. (R. 23). In February, 1964, he was discharged from the Air Force. (Tr. 45).

As already noted, the district court ruled that Bryant had been acting within the course and scope of his employment for the Government in driving his private automobile home for a vacation. (R. 26-27). The court placed particular reliance on the fact that Bryant was driving pursuant to written orders and that he was carrying equipment to be used by him at his destination, Pope Air Force Base.

STATUTES INVOLVED

Sections 1346(b) and 2674 of Title 28 U.S.C., The Federal Tort Claims Act, provide in pertinent part:

Section 1346. United States as defendant.

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2674. Liability of the United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

SPECIFICATION OF ERRORS

1. The district court erred in holding that Airman Bryant was acting within the scope of his employment at the time of the accident.

2. The district court erred in entering judgment against the United States.

SUMMARY OF ARGUMENT

Under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2674, the United States is, of course, liable for injury caused by the negligent or wrongful act of a governmental employee only if the employee is acting within the scope of his employment. Furthermore, it has been settled, since Williams v. United States, 350 U.S. 857, that the question of whether federal employees are acting within the scope of their employment so as to render the Government liable for their acts depends not upon federal law but upon respondeat superior law of the state in which the act or omission occurred. See also, Witt v. United States, 319 F. 2d 704 (C.A. 9); Chapin v. United States, 258 F. 2d 465 (C.A. 9), certiorari denied, 359 U.S. 924, rehearing denied, 359 U.S. 976; United States v. Campbell, 172 F. 2d 500 (C.A. 5), certiorari denied, 337 U.S. 957. Therefore, in the instant case, the question of whether Aaron Bryant was acting within the scope of his employment at the time the accident occurred is to be resolved by the law of California, where the accident happened.

Under that law it is clear that an employee driving his own car home to enjoy a 45 day vacation is accommodating his own convenience and purely personal wishes. He is not then acting in the furtherance of his employer's business interests so as to charge the employer with vicarious liability for his tortious driving.

It is equally clear that under California law, the United States may not be held responsible in the present case because Bryant's use of his private car was in connection with a permanent change of his station. The starting point for any discussion of the application of California respondeat superior law to government employees travelling to or from a new job location in their own automobiles because they choose to go by that means of conveyance, rather than by available public conveyance, is this Court's decision in Chapin v. United States, 258 F. 2d 465, certiorari denied, 359 U.S. 924, rehearing denied 359 U.S. 976. In Chapin it was held that, under the law of California, servicemen travelling in their own automobiles to a base to which they had been re-assigned were not acting within the scope of their employment. This Court's decision in Chapin rested in large part upon a case decided by a California court, in which a private employer was absolved of liability for the negligence of an employee who chose to drive his own vehicle from one permanent job location to another. McVicar v. Union Oil Co., 138 Cal. App. 2d 370, 292 P. 2d 48 (1956). In Chapin, after a careful analysis, this Court concluded that "the basis of the McVicar case [is] that the act of travel by the employee is not one subject to the employer's control as a part of the duties the employee was hired to perform. Similarly, the act of a soldier's travel on a permanent change of station is not a part of the duties for which he is

gaged. It is conduct the control of which is beyond the rms of the employment relationship." 258 F. 2d at 469-70.

Both the California court in deciding McVicar, and this urt in deciding Chapin, stressed that it was the employee nd not the employer who chose the means of conveyance, that e employee had not been required to use his automobile, and at the employer exercised no control over the details of the riving, or the condition of the automobile. Additionally it hould be noted that in both of those cases, as in the case ere, the accident occurred during leave time.

The present case differs from Chapin and McVicar only in hat Bryant, in proceeding from one permanent duty station to nother, was assigned two temporary duty stops in the interim. ut this difference neither requires, nor does it support, a esult different from that in Chapin. We submit that it can ake no difference that the employee was, in the course of a ermanent transfer, proceeding to his new permanent duty station s in Chapin, or to a temporary assignment prior to reporting o his new permanent duty station as in the present case. As n the Chapin case, the travel here occurred during a break n employment with a leave of absence enroute to the new duty tation. The fact that an interim destination here was a emporary duty station can have no bearing on the question of hether Aaron Bryant was within the scope of his employment.

In short, every reason mentioned in Chapin and McVicar for the employer's non-liability under California principles of respondeat superior applies with equal force here. The Judgment of the district court should therefore be reversed.

ARGUMENT

A. AN EMPLOYEE TRAVELLING IN HIS OWN CAR ON THE WAY HOME FOR A 45 DAY VACATION IS ACCOMMODATING HIS PERSONAL CONVENIENCE AND WHILE ON LEAVE IS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT.

Aaron Bryant was allowed 45 days of leave or vacation time and 12 days of authorized travel time between the time he left Travis Air Force Base on November 19, 1963, and the time he was to have arrived at Pope Air Force Base, Januar 1964. Manifestly Bryant would not have begun his trip east until January 8, 1964, had he not been given a vacation. Bryat time from November 19, 1963 to January 8, 1964, at which time he would have had to commence travel, was his own to do with as he pleased. These factors, together with Bryant's acknowledgement that he was going directly to his home in East Orang, New Jersey, necessarily establish that Bryant was on vacation or on leave from duty at the time the accident occurred.

Numerous California cases have refused to impose liabilit on an employer where the accident occurred at a time when the employee was on his own time and pursuing his own personal

wishes and convenience.[2/] See e.g., Lee v. Nathan, 67 C.A. 111, 226 Pac. 970 (1924); Kish v. California State Auto Association, 190 C. 246, 212 Pac. 27 (1922). In fact, the employee in McVicar was travelling during his leave time.

The Supreme Court has stated that a soldier on leave is "at liberty to go where he will during the permitted absence, to employ his time as he pleases." United States v. Williamson, 23 Wall. 411, 415 (1874). It is clear that military personnel on leave, or on their own time, are not acting within the scope of their employment. E.g., United States v. Hainline, 315 F. 2d 153 (C.A. 10), certiorari denied, 375 U.S. 895; Brucker v. United States, 338 F. 2d 427 (C.A. 9), certiorari denied, 381 U.S. 937; Bach v. United States, 92 F. Supp. 715 (S.D.N.Y.). Specifically it has been held that the act of driving between duty stations by soldiers is not within the scope of their employment when they are in an off-duty or leave status. McCall v. United States, 338 F. 2d 589 (C.A. 9), certiorari denied, 380 U.S. 974; Cobb v. United States, 247 F. Supp. 505 (N.D. Ill.), affirmed 367 F. 2d 132 (C.A. 7). Accord, Voytas v. United States, 256 F. 2d 786 (C.A. 7). As Judge Sobeloff noted in Cooner v. United States, 276 F. 2d 220, 225 (C.A. 4): "A

2/ Additional support for this rule is found in those California cases holding that an employer is not liable for the negligent driving of an employee going to or from work in his own automobile. See note 5, infra.

serviceman on leave or on pass, cannot normally be said to be acting within the scope of his employment. He is in a simila position to a private employee during the latter's non-work hours or vacation." Indeed, the imposition of liability on the United States in the Cooner case was justified by the Cou on the ground that the serviceman there involved was not on vacation or leave. See Cooner v. United States, supra, 276 F. 2d 220, 234.[3/] Since Bryant was on an extended leave or vacation, it is clear that his accident cannot be said to have occurred within the scope of his employment, but rather as pa of the furtherance of his own personal convenience and objecti

B. AN EMPLOYEE DRIVING HIS OWN CAR DURING A TRANSFER OF DUTY STATIONS, INVOLVING A SHARP BREAK IN EMPLOYMENT, IS NOT ACTING WITHIN THE SCOPE OF EMPLOYMENT.

Although Aaron Bryant was employed by the government, driving an automobile was not one of the duties of his job. H was in no way serving the interest of his employer by driving his car but rather he was acting on his own behalf since his duties at Travis Air Force Base had ceased and he had not yet begun his flight training at Pope Air Force Base. In Seivers

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3/ In Cooner v. United States, 276 F. 2d 220, 224 (C.A. 4), Judge Sobleoff reviewed the facts of United States v. Eleazer, 177 F. 2d 914 (C.A. 4), certiorari denied, 339 U.S. 903, and referring to the holding of no-government liability in that ca stated:

> * * * the decision there was clearly correct under the circumstances, as the lieutenant was on leave and traveling to his home for his own purposes

Both of those factors are, of course, also present in this case

United States, 194 F. Supp. 608, 613 (D. Ore.)[4/] involving a permanent transfer of duty station, the court stated that the employee "at all times remains an employee of the employer * * * [but] during the transfer period he is acting on his own." It is important, in this connection, to distinguish between the goal of ultimately arriving at Pope Air Force Base, which does benefit the employer, and the act of driving there.[5/] The driving by Bryant was an act bearing no relation to his employment and in no way itself served to benefit the Air Force. See United States v. Eleazer, 177 F. 2d 914, 917 (C.A. 4), certiorari denied, 339 U.S. 903; Gittleman v. Hoover Co., 337

4/ The facts of Seivers are remarkably similar to this case. Leave time plus travel time was granted to the soldier, a permanent transfer was involved, use of a privately owned car was authorized, and travel expenses would be reimbursed. The soldier was going home prior to reporting at his new duty station, and the accident occurred on a road which was the direct route to his home in Tennessee and his new duty station in New Jersey. The court found the driving outside the scope of employment. In reaching that decision the court applied Oregon law, but in doing so relied heavily on McVicar and Chapin as indications of the common law applicable to this question.

5/ Cobb v. United States, 247 F. Supp. 505 (D. Ill.) draws this same distinction and analogies to the rationale involved in finding that an employee is not acting within the scope of his employment in going to and coming from work. There can be no doubt that under California law, an employer would not be liable for the negligent driving of an employee going to or coming from work in his own automobile. See, e.g., Nussbaum v. Traung Label & Lithograph Co., 46 Cal. App. 561, 189 Pac. 728 (1920); Mauchle v. Panama-Pacific Intl. Exposition Co., 37 Cal. App. 715, 174 Pac. 400 (1918). Cf. Loos v. Boston Shoe Co., 123 Cal. App. 2d 564, 266 P. 2d 884 (1954).

Pa. 242, 10 A. 2d 411 (1940); Reiling v. Missouri Insurance Co., 236 Mo. App. 164, 178, 153 S.W. 2d 79, 86, (1941); Conversion and Surveys, Inc. v. Roach, 204 F. 2d 499 (C.A. 1); Parmlee v. Texas and New Orleans R. Co., 381 S.W. 2d 90 (Tex. Civ. App. 1964); Curtis v. Juengel, 297 S.W. 2d 598 (Missouri 1957). Additionally, in Chapin, this court stated:

> [W]hile travelling by self-selected means with competent orders concerned only with the ultimate reporting date, a soldier is not acting within the scope of his employment in the sense required for application of the doctrine of respondeat superior. Id. at 469.

More recently in Romitti v. United States, 363 F 2d 662 this Court, though holding the employer liable, stated that there were no "invariable rules" for determining whether a given act was within the scope of employment and reiterated its position in Chapin that "each case must be determined on its own peculiar facts and circumstances." Id. at 665. Additionally this Court noted:

6/ The employee there was travelling during his regular office hours and his temporary duty was completed in one morning. This court, in finding the employee within the scope of employment, characterized the brief trip as an errand for the employer's business which was being furthered, liability under the California law followed. That rationale is clearly not applicable here. California draws a distinction between transfer cases (such as the case here, as is seen by the decision in McVicar and this court's similar decision in Chapin) and special errand cases. See e.g., Vind v. Asamblea Apostolica Cristo Jesus, 148 Cal. App. 2d 597, 307 P. 2d 85 (1957); Boynton v. McKales, 139 Cal. App. 2d 777, 294 P. 2d 733 (1956).

> Thus in Chapin these factors, plus the fact that the travel occurred during a sharp break in the course of the employment (the employee had terminated his work for his employer at one permanent station and had not yet begun work at the next), and that the employee was given leave of absence enroute, free of any obligation to his employer, permitted the inference that the employee was not furthering his employer's purposes when the accident occurred. Romitti v. United States, 363 F 2d 662, 665-6.

The inference suggested in Romitti is plainly present in this case, as it was in Chapin. The only distinction which can be drawn between the facts of this case, and those present in Chapin is that the employee in Chapin was to be permanently stationed in Corpus Christi, whereas Aaron Bryant, although having permanently departed from Travis Air Force Base was re-assigned to a temporary duty station for purposes of flight training prior to reporting at his new permanent duty station. Nonetheless, the "sharp break in employment" emphasized in Romitti as being present in Chapin, was also present here. "[T]he employee had terminated his work for his employer at one permanent station and had not yet begun work at the next." Romitti v. United States, 363 F. 2d 662, 665-6.

C. THE RESPONDEAT SUPERIOR LAW OF CALIFORNIA MAKES THE EMPLOYER RESPONSIBLE ONLY IF HE HAD THE RIGHT TO CONTROL THE EMPLOYEE AT THE TIME OF THE ACCIDENT.

We have already shown that in driving his own car to his home for a 45 day vacation before effecting a permanent change of station Bryant was acting in furtherance of his personal

convenience and purposes and not those of his employer. For that reason alone, respondeat superior liability may not be imposed.

There is, however, an additional reason precluding the imposition of respondeat superior liability here, i.e. the lack of control over the employee's driving of his own car.

In Chapin v. United States, supra, this Court relied heavily on the California case of McVicar v. Union Oil Co., supra, in which an employee was driving his own truck from San Francisco to **Spokane** as part of a permanent transfer of job locations. In holding that such activity was not within the scope of employment, the court reasoned that the employer had no control or right of control over the "route, mode of transportation or any feature" of the trip. Id. at 373. The California court in McVicar relied heavily on United States v Sharpe, 189 F. 2d 239 (C.A. 4); and United States v. Eleazer, 177 F. 2d 914 (C.A. 4), certiorari denied, 339 U.S. 903. The latter of those two cases shows that the Restatement of Agency makes it clear that no liability would be imposed upon an employer in circumstances such as those present in this case (Restatement, Agency 2d, section 239, comment b):

> The fact that the instrumentality used by the servant is not owned by the master is a fact which may indicate that the use of the instrumentality is not authorized, or if authorized, that its use is not within the scope of employment. The master may authorize the use of a particular instrumentality without assuming

> control over its use as a master. The fact that he does not own it or had not rented it upon such terms that he can direct the manner in which it may be used indicates that the servant is to have a free hand in its use. If so, its control by the servant, although upon his master's business, is not within the scope of the employment. (emphasis added).

In the present case, as in McVicar and Chapin, the employee as not required to use an automobile for transportation nor id the employee's use of an automobile in an way benefit the mployer. On the contrary Bryant chose to drive for his own urpose and convenience, so that he could go to East Orange, ew Jersey to spend the Thanksgiving and Christmas holidays ith his family and, presumably, so that he could enjoy the se of a car during the time he was in New Jersey. The govern ent had no control over the condition of the car Bryant was riving, nor did it have any control over his method of opera ing the vehicle or in the details of his driving. Bryant ould have attempted to make the trip in as short or as long time as possible. He could have driven all day and all ight; or he could have used all his travel time plus his eave time to make a leisurely and scenic trip. The only nterest of the government was that Bryant arrive at Pope ir Force Base on or before January 20, 1964. Manifestly, hat interest falls far short of the type of control necessary o bring driving within the scope of his officially-assigned mployment duties and responsibilities. In Chapin, this court

applied the control test used in McVicar, and finding the employer had no right to control the mode of transportation and the manner of driving or the condition of the car, this Court stated:

> [T]he act of a soldier's travel on a permanent change of station is not a part of the duties for which he is engaged. It is conduct the control of which is beyond the terms of the employment relation. 258 F. 2d 465, 469-470.

The fact that the driver here involved was a serviceman[7/] cannot enlarge the area of the government's respondeat superior liability. Williams v. United States, 350 U.S. 857. Indeed, this Court in Chapin, reiterated the fact that the unique relationship of soldier to employer had no bearing in determining respondeat superior liability. Accord Bissel v. McElligott, 366 F. 2d 780 (C.A. 8); McCall v. United States, supra; United States v. Sharp, supra; United States v. Eleazer supra; Myers v. United States, 219 F. Supp. 71 (D. Mo.) affirmed 331 F. 2d 591 (C.A. 8).

Nor can the district court's imposition of liability be justified because of the fact that Airman Bryant was transporting "military clothing, tools and equipment." (R 27)

7/ The findings of fact by the district court are replete with references to Airman Bryant's "orders", that he was driving pursuant to written orders, he was to spend leave in New Jersey set out in orders, and that he was carrying out the terms and directions contained in said orders. (R. 27). Airman Bryant's permission to take 45 days of leave, and to use his own car, while set out in what was captioned "Special Order" (R. 19), was authorized, but not commanded, and was more of a permission than an order.

Under California law this fact standing by itself, has little bearing on the scope of employment question. Thus, in McVicar the employee was transporting some equipment he used in his work and yet the court did not find that fact significant in determining whether respondeat superior liability should be imposed. The same effect see Cragun v Krossoff, 45 C.A 2d 480, 114 P. 2d 431 (1941); Conversions and Surveys, Inc. v. Roach, 204 F. 2d 499 (C.A. 1); Restatement of Agency 2d § 239, Comment b, Illustration 4. Moreover, it is clear that Bryant was transporting his own baggage only because he had decided--for personal reasons--to travel home by private car. There obviously was no showing, or even suggestion, that the baggage transportation by private car--rather than by common carrier--was in furtherance of the government's interests. Absent a showing, the court below improperly relied on Bryant's transportation of his own baggage. For that reason and for others outlined above, we submit that the court below erred in ruling that Bryant was acting within the scope of his employment.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the district court should be reversed with directions that judgment be entered in favor of the United States.

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DECEMBER 1967

CERTIFICATE

I certify that, in connection with the preparation of this
rief, I have examined Rules 18 and 19 of the United States
ourt of Appeals for the Ninth Circuit, and that, in my opinion,
he foregoing brief is in full compliance with these rules.

Morton Hollander
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AFFIDAVIT OF SERVICE

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) SS.

Morton Hollander, being duly sworn, deposes and says:

That on December 15, 1967, he caused three copies of the foregoing brief for appellant to be served by air mail, postage prepaid, upon counsel for appellee:

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Subscribed and Sworn to
before me this 15th day of December,
1967.

Angeline Johns
NOTARY PUBLIC

My commission expires April 14, 1972.

No. 22,078

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

NOEL HUNT MCROBERTS, *et al.,*

Appellees.

On Appeal From the United States District Court for the Central District of California.

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Appellees.

On Appeal From the United States District Court for the Central District of California.

APPELLEES' BRIEF.

Jurisdictional Statement.

The appellees brought this action for personal injuries against the United States under the Federal Tort Claims Act for damages caused by the negligent driving of a serviceman. In a separate trial limited to the issue of whether or not the serviceman was acting within the scope of his employment for the United States Government, the United States District Court for the Central District of California entered judgment of $69,700.00 in favor of the appellees. 28 U.S.C. 1291 controls the jurisdiction.

Case Statement.

This is an action for damages under the Federal Tort Claims Act for personal injuries caused on November 20, 1963, by the negligent driving of Airman Second Class Aaron G. Bryant. While Bryant was attempting a negligent passing maneuver, the automobile of appellee Noel Hunt McRoberts collided with an automobile driven by Ray Allen Gorham. McRoberts suffered personal injuries and his wife and mother-in-law were killed. With the exception of what the appellant's argumentatively claim Airman Bryant "could have" done and that he was "taking full advantage" when he left Travis Air Force Base on November 19, 1963, pursuant to his service orders (App. Op. Br. p. 4, lines 1 and 3), the appellees accept the appellant's statement of the case.

I.

Chapin v. United States (1958), 258 F. 2d 465 (C.A. 9), and United States v. Romitti (1966), 363 F. 2d 662 (C.A. 9), Are the Only Two Crucial California Scope of Employment Decisions.

There is no question that the United States is liable for injuries caused by negligent acts of Governmental employees operating within the scope of their employment. 28 U.S.C. 1346(b), 2674. The single issue on appeal is whether or not Airman Bryant was acting within the scope of his employment when the accident occurred. Two Ninth Circuit cases are germane to this discussion: *Chapin v. United States* (1958), 258 F. 2d 465 (C.A. 9), and *United States v. Romitti* (1966), 363 F. 2d 662 (C.A. 9). *Chapin* relied solely on *McVicar v. Union Oil Co.* (1956), 138 Cal. App. 2d 370, a "transfer case" involving an employee of United Air Lines. *Chapin* stated "(T)hat no single relevant factor is

necessarily controlling . . . In each case involving scope of employment, all of the relevant circumstances must be considered and weighed in relation to one another (citation)". Since through *McVicar Chapin* took a very narrow view, *Chapin* clearly rests on restricted authority. For this reason appellees believe it is unnecessary to reanalyze *Chapin* to help decide the instant case.

Perhaps this court realized *Chapin's* insular relevance when it decided *United States v. Romitti* (C.A. 9, 1966), 363 F. 2d 662. Imbued with the searching spirit of distilling the reasons and policies underlying the *respondeat superior* doctrine, this court decided differently in *Romitti* than it did in *Chapin.* Appellees suggest that it is not the result so much as the reasoning which sparks *Romitti* and gives California's *respondeat superior* doctrine the life and clarity which *Chapin* denies it. It seems this court was waiting for a chance to extricate itself from the *Chapin* dilemma. Or it may be that *Chapin* did not give the values and interests inherent in the *respondeat superior* doctrine the credence they deserve.

In *Romitti* the United States ordered a government employed electronics engineer to travel from a military base in Kern County to one in El Centro as part of his regular duties. The government authorized him to travel by government or commercial carrier, or by private automobile. The Government reimbursed the employee for mileage and gave him a $16.00 per day allowance. The accident occurred when the employee was returning from El Centro to Kern County.[1]

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[1]In *Romitti* the court said: "To summarize the trier of fact had before it evidence that Mr. Moore was traveling on *direct*

(This footnote is continued on the next page)

The status of the Government employee in *Romitti* and Airman Bryant in our case is strikingly similar. Bryant received direct orders to transfer from Travis Air Force Base, California, to Pope Air Force Base, North Carolina; there was at least a dual purpose of serving his employer's business and his own personal interests; he was transporting property (flying suit, helmet, oxygen masks, assorted tools); he was on the most direct route (Route 66); he was using an expressly authorized means of transportation (his own private car as authorized by his orders); he was driving during regular working hours (November 20, 1963, at approximately 10:00 a.m.); he was receiving his regular salary and per diem plus transportation costs (Bryant received advanced travel pay of $290.30 to cover transportation, meals and lodging).

Not unlike the Government position in this case the Government in *Romitti* argued that *Chapin* said that as a matter of law an employee driving his own automobile is not within the scope of his employment where the automobile use is permissive and not part of the employee's normal duties, and the employer exercises no control over the details of the driving.[2]

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orders of his employer and of the *sole purpose of serving his employer's business;* that he was *transporting property* of the employee and fellow employees (including his supervisor), both necessary to the performance of that business; that he was traveling on the most *direct route* between two of employer's work locations; that he was using an *expressly authorized means of transportation;* that he was *driving during regular working hours;* and that he was *being paid his regular salary* plus per diem plus costs of transportation."

[2]In *Romitti* at 665, the court stated "The Government reads Chapin as deciding under California law an employee driving his own automobile cannot, as a matter of law, be acting within the scope of his employment where use of the private automobile is permissive rather than required, the employer exercises no control over the details of the driving, and driving is not part of the employee's normal duties."

Romitti stated emphatically that each case should turn on its own facts and circumstances. No single relevant factor should control. Appellees maintain that this court in *Romitti* clearly explained the policies and interests underlying application of California's *respondeat superior* doctrine, and intuitively suggested solid notions of protection which prevail in the instant case. At page 665 this court stated:

> "In the present case the flat rule which the Government suggests would preclude employer liability in circumstances in which the purpose of the rule requires its imposition."

Further at 665 *Romitti* cited Chief Justice Traynor's language and said:

> "*The principal justification for the application of the doctrine of respondeat superior in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as a part of his costs of doing business.*"

Romitti said that this purpose required the employer to assume those risks incident to his business, but not to an employee's purely personal pursuits:

> "Thus when *respondeat superior* liability is asserted, we are not . . . looking for the master's fault but rather for risks that may fairly be regarded a typical of or broadly incidental to the enterprise he has undertaken (citation)." Page 666.

Obviously the *Romitti* court believed that the underlying risk distribution principles justifying the *respondeat superior* doctrine applied. The economic allocation-distribution rational is not novel to American juris-

prudence. However, it is gaining dramatic acceptance in assorted legal fields from California's strict liability in tort to its application of *respondeat superior,* and all relevant areas in between. In *Romitti* the United States Government was the "master" against whom they were asked to apply the *respondeat superior* doctrine. In *Chapin* this same court said no distinction should be made between a private employer and a government employer for the purposes of applying this doctrine. Apparently the court felt that the reasons justifying the rule applied equally to the Government in *Romitti* as it would to any private employer under different facts. Appellees infer from this court's language in *Romitti* that the purpose of the *respondeat superior* doctrine is to protect innocent people harmed through no fault of their own, and not to insulate principals from the negligence of their agents. The master distributes the liability costs over the entire economic base of his activity. Liability insurance is the common method:

> "We are no longer dealing with specific conduct but with the broad scope of a whole enterprise. Further, we are not looking for that which can and should reasonably be avoided but with the more or less inevitable toll of a lawful enterprise. These are the standards applied by California courts." (emphasis aded) *Romitti,* page 666.

Surely the court in *Romitti* was not suggesting that the United States Government should take out policies of liability insurance. Perhaps *Romitti* meant to infer that the breadth of the United States Government's economic base was sufficient to absorb the costs of liability imposed in personal injury suits in which the United States was a defendant.

Appellees maintain that the purpose of the *respondeat superior* doctrine is to protect injured people by compensating them for injuries incurred through no fault of their own. The focus of the reason underlying the rule is not to insulate employers from liability for their servants but to protect innocent people who are injured. In this context this court's attitude shift from *Chapin* to *Romitti* is significant. The different results are not critical. The court's attitude and the policies it enunciates about California's *respondeat superior* law is. In 1958 this court said through *Chapin* that the master, the United States Government, was the one the law should "protect". In 1966 this court said in *Romitti* that the innocent injured person was the one the law should "protect". The attitude change is dramatic and unequivocal:

> "*The principal justification for the application of the doctrine of respondeat superior in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as part of his costs of doing business.*" (emphasis added) *Romitti* page 665.

In *Romitti* the employee was a civilian engineer employed by the United States and assigned to Edwards Air Force Base, Kern County, California. In the present case Mr. Bryant was an Airman Second Class in the United States Air Force. If this court accepts the notion that the protective features of California's *respondeat superior* law focus on innocently injured people, and support this view with the risk distribution features the court articulated, then certain results in this case necessarily follow.

Are there sound reasons for saying a civilian governmental employee can act as a conduit to his employer's

vicarious liability, but a serviceman cannot? If the policy is to protect injured people by imposing vicarious liability on a master for his servant's negligence, are there reasons for distinguishing either the positions of the injured plaintiffs in *Romitti* and in this case, or the masters against whom these plaintiffs seek to impose liablity?

The answer is an unequivocal No! The Federal Tort Claims Act makes the United States liable under those circumstances where a private person or organization would be liable. By the terms of the Statute no such distinction can be drawn.

II.

California Vehicle Code's Comprehensive Protective Scheme Requires a Decision Consistent With the Policies This Scheme Hopes to Promote.

A critical feature of California's vehicle laws reinforces appellees' position. California has a comprehensive protective scheme of financial responsibility[3] and uninsured motorist protection[4] designed to protect and compensate people injured through traffic accidents. Under California Vehicle Code Section 16430 each operator of a motor vehicle must be able to respond in damages to $10,000.00 for each individual injury and to $20,000.00 if two or more receive injuries in the same accident.[5] If the motor vehicle operator is not

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[3]Vehicle Code § 1600, *et seq.*

[4]Insurance Code § 11580.2. This is the "uninsured motorist" section. In effect it insures each driver against injury caused by an uninsured driver.

[5]The new 1968 amendment requires the same coverage but increases the amount: "Proof of ability to respond in damages where required by the code means proof of ability to respond in damages resulting from the ownership or operation of a motor vehicle and arising by reason of personal injury to, or death of,

financially responsible, the California Department of Motor Vehicles suspends his license and automobile registration.[6] Usually the proof if financial responsibility takes the form of a normal liability insurance policy. Obviously, the California legislature wants to compensate injured people, and to insure that they have recourse to economic reserves.

Under California's financial responsibility requirements, Pfc. Frehe in *Chapin,* engineer Moore in *Romitti,* and Airman Bryant in this case would all lose their California driving privileges if they could not meet California's financial responsibility requirements. The ability to respond financially in damages is a mandatory prerequisite of the privilege of driving in California. Should the law apply differently to these three men? A decision inconsistent with the District Court's position would suggest that if these men had no automobile insurance, the legislature meant to abrogate this law where Government employees negligently operated motor vehicles in the course and scope of their employment. This would be wholly inconsistent with California's financial responsibility policies, and with the purpose of the *respondeat superior* doctrine.

If the Government need no respond in damages under California's comprehensive protection scheme, the result thwarts the law's obvious policies: the innocent injured party cannot recover; the Government employer does not have to distribute this risk as a cost of

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one person, of at least * * * Fifteen Thousand Dollars ($15,000), and, subject to the limit of * * * Fifteen Thousand Dollars ($15,000) for each person injured or killed, of at least * * * Thirty Thousand Dollars ($30,000) for such injury to, or the death of, two or more persons in any one accident . . ." (As amended Stats. 1967, c. 862, p. .... § 5, operative July 1, 1968).

[6]Vehicle Code § 1600, *et seq.*

doing business; and the employee tortfeasor loses is California driving privilege. These results make it clear that if this court reversed the District Court, its decision would contravene the established and supposed policies articulated by this court in *Romitti* and established by the California legislature in the Vehicle Code.

III.

Considerations of Temporary vs. Permanent Duty Stations, the Number of Service Equipment Items, the Reimbursement, the Travel Hours, and the Route Are Relevant but Not Decisive on the Issue of Respondeat Superior.

The answer sems relatively clear. If the policy underlying the *respondeat superior* doctrine in California is to protect innocent people from injury through compensation and to allocate the costs of this financial loss over a business' entire economic base, then the facts in this case call for *Romitti's* result and reasoning. Surely Pfc. Frehe in *Chapin* was no less culpable than engineer Moore in *Romitti* and Airman Bryant in this case. Nor was Mr. Chapin less innocent than Messrs. Romitti and McRoberts in this case. Therefore, it is not sound to say that plaintiff Chapin warrants less protection than Plaintiffs Romitti and McRoberts. Nor is it sound to say that this court should insulate the United States Government from liability based on shallow considerations. The "permanent", or "temporary" duty stations, the number of service equipment items in an automobile, the amount of travel reimbursement, the directness of the route, the exact driving hours, and the authorized transportation are superficial. A decision with the impact and ramifications that one of these facts present requires a sounder base.

Appellants agreed that the Government computes a serviceman's "travel time" according to specified regulations. The principal purpose of these provisions is to meet certain military accounting and fiscal requirements; the idea is to give a serviceman a cash travel allowance in change-of-duty orders in lieu of transportation in kind. Clearly, this is an accounting procedure not influential by what actually occurs. Thus, according to the Governments Accounting Principles, Airman Bryant's "leave" began when he left Travis Air Force Base. Since the whole period covered by Bryant's orders does not help determine his status, it is necessary to look at the indicia of agency to determine whether he was serving his master's interests at the time of the accident. The following facts are clear about Airman Bryant:

1. He acted pursuant to Government orders.
2. His orders implied both leave and travel time.
3. He received travel pay covering the time of the accident.
4. He was in military uniform.
5. He was making a temporary duty change.
6. He had Government equipment in his car.
7. He was driving an authorized vehicle.
8. He was on the most direct route towards his new base.

Traditionally, the courts looked at these indicia to decide if the serviceman was serving his master at the time of the accident. Recently, the courts have attached importance to whether the change was permanent or temporary. Airman Bryant's transfer was

temporary. These agency indicia make it clear. Bryant was within the course and scope of his employment.

This court in *Romitti* abandoned some of these traditional indicia formerly on by prior decisions to establish a basis for recovery:

> "Similarly, the failure of the employer to exercise control over the employees driving is a factor of varying importance. *Existence of the power to control the physical details of the service may be crucial when the question is whether the actor is an agent or an independent contractor but may be relatively insignificant in determining whether an admitted agent is acting within the scope of his employment.*" (emphasis added) at page 666.

Nor is appellant's contention critical that Airman Bryant planned to devote part of his leave time for purely personal reasons:

> "We assume that in exercising the election which the United States gave these employees to use a private vehicle in performing the employer's errand, *the employees were motiviated at least in part by considerations of personal comfort and convenience. Nevertheless, the choice also served the interests of the United States and this is enough.*" (emphasis added) at page 666.

And with sanguine glee this court quashed traditional constrained applications of the employer-personal convenience rational and declared:

> "*In addition under California doctrine where the risk is one arising out of the employment the employer is liable even though the act causing harm may serve the employee's needs and not those of the employer.*" (emphasis added) at page 666.

It is clear this tribunal must decide this appeal according to California law.[7] The guagmire of relevant cases from other jurisdictions are confusing, inconsistent and inapplicable to this case. This court must face *Chapin* and *Romitti,* the only two California decisions on whether California's doctrine of *respondeat superior* imposes liability on a Government employer for negligent vehicle operation by its employee. Neither case controls. The plaintiff's loss in *Chapin* and win in *Romitti* is not significant. However, this court's attitude in *Romitti* is. Although *Chapin* may be inapplicable to these facts, appellees need not urge *Chapin's* reversal in order to resolve this case. Nor is it necessary to follow *Romitti.* Interestingly, appellants rely heavily on *Chapin,* but avoid *Romitti* with casual indifference except for an empty reference that each case turns on its own facts.

Chapin and *Romitti* reflect divergent views on California's *respondeat superior* law. However, appellees do not believe they present the judicial traveler with equal alternatives. *Chapin* is circumscribed. *Romitti* is innovative. The Government interprets *Chapin* now just as it did in *Romitti.* Appellees agree with the Government's interpretation of *Chapin.* Yet this court rejected this interpretation in *Romitti* because it was too restrictive. Appellees urge this court to do it again. Appellees respectfully submit that this court should affirm the District Court's decision that Airman Bryant was acting within the scope of his employment.

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[7]*William v. United States,* 350 U.S. 857.

Conclusion.

Appellees respectfully submit that the United States Court of Appeals for the Ninth Circuit should affirm the judgment of the District Court in favor of Noel Hunt McRoberts, *et al.*

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By DANIEL C. CATHCART,
Attorneys for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DANIEL C. CATHCART